SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1655

MYER AARON RUHM,
Petitioner,

vs.

BOB TURNER, Sheriff,
Oklahoma County, Oklahoma,

and

Hon. HEZ J. BUSSEY, Judge,
Hon. TOM BRETT, Judge,
and
Hon. ROBERT D. SIMMS, formerly Judge,
Court of Criminal Appeals, State of Oklahoma,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Comes now Myer Aaron Ruhm, and prays that a Writ of Certiorari issue to review the decision(s) rendered by the United States Court of Appeals for the Tenth Circuit herein on July 12, 1973, and February 4, 1974

(and thereby, in effect, to review the decision rendered by the United States District Court for the Western District of Oklahoma on February 28, 1973, the decision rendered by the Court of Criminal Appeals of the State of Oklahoma on April 11, 1972, and the conviction and sentence imposed by the District Court of Oklahoma County, State of Oklahoma, on November 17, 1970).

OPINIONS BELOW

The decisions ("Orders") of the Court of Appeals, unreported, are produced at Appendix A, infra, p. A-1, and at Appendix B, infra p. B-1. The opinion of the United States District Court for the Western District of Oklahoma is reported at 354 F.Supp. 324, and is reproduced at Appendix C, infra, p. C-1. The opinion of the Court of Criminal Appeals of the State of Oklahoma is reported at 496 P.2d 809, and is reproduced at Appendix D, infra, p. D-1. The conviction and sentence of the District Court of Oklahoma County, State of Oklahoma, is not reported.

JURISDICTION

The final judgment of the Court of Appeals (Appendix B, infra, p. B-1) was entered on February 4, 1974. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Petitioner, a member of the male sex, was tried and convicted as an adult and a felon for the offense of possession of marijuana, the said possession alleged to have occured when Petitioner was but 17 years of age. Under the Oklahoma law at the time, 10 O.S. 1970 Supp., §1101(a), offenders 16 to 18 years of age of the

male sex were prosecuted as adults and felons for their misdeeds, while offenders 16 to 18 years old of the *female* sex were only processed as juveniles and delinquents for theirs -- the effect being, for all offenders within the 16 to 18 year old age bracket, that of an extremely disparate sentencing or penal scheme, discriminating amongst violators of the same laws solely on the criterion or basis of their sex, and to the severe prejudice of offenders belonging, as does Petitioner, to the unfavored, male, sex.

1. The basic substantive question presented by this Petition is, Whether, consistent with the Constitution, teenaged offenders of an *unfavored* sex may be prosecuted as "adults" and "felons" for their misconduct, while like-aged offenders of the favored sex are only processed as mere "juveniles" and "delinquents" for their identical (or even worse) misdeeds?

This basic Question may be sub-analyzed as follows:

a) Is it a violation of the Equal Protection of the Laws Clause of the Fourteenth Amendment to the Constitution to statutorily discriminate solely on the basis of *sex* in determining which youthful offenders (i.e., those of the favored sex) are to be processed for their misdeeds as mere "juveniles" and "delinquents," and which other youthful offenders (i.e., those of the unfavored sex) are to be prosecuted as "adults" and "felons" for their identical misdeeds.

b) Is it a violation of the Due Process of Law Clause of the Fourteenth Amendment to employ an offender's *sex* as constituting a "permanent irrebutable presumption of fact" to "establish" that the offender of the unfavored sex achieves at age 16 that degree of mental maturity prerequisite to holding him *criminally* accountable

for his misdeeds, which mental maturity the similar offender of the favored sex is not deemed to achieve until age 18?

c) To the extent that certain teenaged offenders in Oklahoma, solely because of their biological sex, and by the mechanism of their being *ipso facto* denominated statutorily as "adults" and "felons" for their misdeeds, thereby suffer the added lifelong penalty of *disfranchisement* as a collateral consequence of their "convictions", while like-aged, similarly-offending "juveniles" of the favored sex do not suffer disfranchisement as a collateral consequence of their "adjudications" of "delinquency," is the sexually-equal-suffrage guarantee of the Nineteenth Amendment to the Constitution also violated?

d) Can the *excess* in punishment statutorily imposed upon certain youngsters in Oklahoma, solely because of the biological status (or medical condition) of their sex, over and above that punishment permitted by statute upon like-aged, similarly-offending members of the favored sex, be viewed as *pro tanto* punishment for biological (or medical) "status" within the sense of *Robinson v. California* (1962) 370 U.S. 660, and hence forbidden by the Cruel and Unusual Punishment Clause of the Eighth Amendment, and the Due Process of Law Clause of the Fourteenth Amendment, to the Constitution?

e) To the extent that "felons" of the unfavored sex are by State statute thereafter barred for life from employment in about thirty-some-odd occupations and endeavors in Interstate Commerce, while like-aged, similarly-offending "delinquents" of the favored sex are not thereafter so barred, are the sexually-equal-economic-opportunity provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 et seq, being violated by this statutory discrimination?

f) Is the instant criminal discrimination based solely on sex contrary to those provisions of the U.S. treaty known as the Charter of the United Nations, 59 Stat. 1035 (1945), by which this Nation has internationally pledged itself to oppose inequality of rights between male and female persons?

2. Since the Oklahoma statutory scheme establishing the sexual discrimination(s) herein was held unconstitutional as violative of Fourteenth Amendment Equal Protection in *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, much of the foregoing question(s) can be rephrased as follows:

a) Is the decision of *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, retroactive; or, more precisely,

b) Is the decision of *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, sufficiently retroactive (or immediate) in its effectiveness as to be available to similarly-situated youngsters, such as this Petitioner, whose conviction under the constitutionally-voided statute was still non-final in the sense of still pending on direct appeal in the State courts, especially in the case of this Petitioner, who on his own had raised these very same sex-equality arguments, independently and in advance of the promulgation of *Lamb* v. *Brown*, supra?

Since the filing of this litigation in the Federal courts, a couple of procedural questions have also arisen. The two chief of these are as follows:

3. Notwithstanding *Preiser* v. *Rodriguez* (1973) 411 U.S. 475, it is permissible for a person not in physical custody to attack his State conviction in the Federal courts alternatively by a 42 U.S.C. 1983 action, for a

declaratory judgment of the conviction's invalidity, 28 U.S.C. 2201 et seq, when, because of said conviction's prior affirmance on the relevant points before the State appellate courts, the declaratory judgment procedure is obviously not being indulged as an evasion of the "exhaustion of State remedies" requirement of Federal habeas corpus, 28 U.S.C. 2241, 2254(b); especially in a case such as Petitioner's, wherein the State made no objection to the declaratory judgment procedure, wherein the U.S. District Court entertained the action as such before the promulgation of *Preiser* v. *Rodriguez*, supra; and wherein certain traditional "civil-rights" relief was co-sought (e.g., restoration of voting rights, expunction of records, engagement in occupations barred to felons, etc.)?

4. Was it proper, after the District Court with full knowledge of the facts had, nevertheless, sustained Federal jurisdiction over Petitioner's case and rendered an adverse opinion on the substantive merits thereof, for the Court of Appeals to dismiss the Petitioner's appeal on the basis that the Petitioner had been a fugitive since before the inception of the Federal attack on his State conviction?

This question may be sub-analyzed as follows:

a) Is "custody" a requirement for a civil-rights action to declaratorily adjudicate the validity vel non of a State conviction?

b) Does a Court of Appeals have statutory jurisdiction to dismiss a civil appeal allowed as of right by statute, for reasons other than those enumerated in the United States Code (or in the Federal Rules of Appellate Procedure) as authorizing dismissals of appeals?

c) Is it proper for a State court to summarily revoke bond for the express reason that a disappointed appellant declares his intention to seek further relief in a Federal court? [1/]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions from the Fourteenth, the Nineteenth, and the Eighth Amendments to the Constitution relied on herein are set out at Appendix E, infra, p. E-1.

The provisions from Title VII of the Civil Rights Act of 1964. 42 U.S.C. 2000e et seq., relied on herein are set out at Appendix F, infra, p. F-1.

The provisions from the Charter of the United Nations, 59 Stat. 1035 (1945), relied on herein are set out at Appendix G, infra, p. G-1.

The State statute assailed as unconstitutional herein, to wit, 10 O.S. 1970 Supp., §1101(a), can be found on page 234 to the [official] 1973 Supplement to the [official] Oklahoma Statutes, and reads as follows:

> **§1101. Definitions.** - When used in this act, unless the context otherwise requires:
>
> (a) The term "delinquent child" means (1) any male person under the age of sixteen (16) years and any female person under the age of eighteen (18) years, who has violated any federal or state law or municipal ordinance, excepting a traffic statute or ordinance, or any lawful order of the court made under this act; or (2) a child who has habitually violated traffic laws or ordinances.

1/ As per Appendix H, infra, p. H-1

STATEMENT OF THE CASE

A. *Facts*

The Petitioner is a member of the male sex. He was born in Washington, D.C., on November 23, 1952, and was therefore only 17 years of age on August 5, 1970, when a microscopic amount of burnt marijuana, and several seeds "resembling" marijuana [2/] were discovered under the seat of his car during a search for weapons as incidental to a traffic arrest.

Although a *female* of 17 would only have been processed as a mere juvenile for this offense, 10 O.S. 1970 Supp., §1101(a), with a maximum incarceration under a civil commitment until her 18th birthday, 10 O.S. 1970 Supp., §1102, 1139(b), with none of the losses of rights or other consequences collateral to a criminal conviction, 10 O.S. 1970 Supp., §1127 (such as disfranchisement, Okla. Const., Art. III, Sec. 1, and disqualification from various engagements in Interstate Commerce, e.g., selling liquor, 37 O.S. 527, surveying, 59 O.S. 475.32, or pharmacy, 59 O.S. 353.26), nevertheless, by 10 O.S. 1970 Supp., §1101(a)'s exclusion of *males* 16 to 18 years old from the protective leniency of the Oklahoma Juvenile Code, the Petitioner was relegated to prosecution under the adult criminal code of the State of Oklahoma for the felony of possessing marijuana, 63 O.S. 1961, §451, 452 (since reduced to a misdemeanor, 63 O.S. 1971, §2-402(B)(2)).

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2. See dissenting opinion to *Ruhm* v. *State* (Okla. Cr., 1972) 496 P.2d 809, p. D-15, infra.

B. *The State Proceedings*

After his trial therefor before the District Court of Oklahoma County, State of Oklahoma, Case No. CRF-70-2230, in November of 1970, Petitioner, although a first offender, was sentenced (on November 17th) to the maximum of seven years' imprisonment, and to a fine of $2,500.00. Petitioner's parents retained other counsel for his appeal, and this subsequent counsel raised as an additional point the argument that the sexually discriminatory exclusion of 16 to 18 year old boys from the Juvenile Code was unconstitutional, and wherefore the adult court had lacked jurisdiction to try the offense in question. [3/]

During the pendency of Petitioner's direct appeal to the Court of Criminal Appeals of the State of Oklahoma (Appeal No. A-16390), the United States Court of Appeals for the Tenth Circuit rendered its opinion in *Lamb* v. *Brown*, 456 F.2d 18 (March 16, 1972), which held unconstitutional the sexual discrimination of 10 O.S. 1970 Supp., §1101(a), supra, on Fourteenth Amendment Equal Protection grounds. Petitioner's then counsel naturally brought this development to the attention of the Oklahoma Court of Criminal Appeals as a complete vindication of his previously-pending sexual-equal-protection claims; but the Oklahoma court, on April 11, 1972, affirmed the Petitioner's conviction notwithstanding, rejecting the Petitioner's Equal Protection claims, over dissent, on the grounds (1) that the jurisdictional issue had not been properly raised at trial, (2) because

3/ In Oklahoma, the erroneous adult conviction of a youngster within the age of juvenility is viewed as a non-waivably jurisdictional nullity. *Ex Parte Powell* (1912) 6 Okla. Cr. 495, 120 Pac. 1022, *Ex Parte Parnell* (1921) 19 Okla. Cr. 273, 200 Pac. 456, and *Ex Parte Brown* (1929) 43 Okla. Cr. 339, 278 Pac. 671, and similar cases.

Lamb v. *Brown*, supra, would be viewed as non-retroactive, (3) and since the decision of *Lamb* v. *Brown*, supra, would in any event be interpreted as having *reduced* the age of juvenility for both sexes to 14, wherefore all male convictions in the 16 to 18 year old bracket were still valid. *Ruhm* v. *State* (Okla.Cr., Apr. 11, 1972) 496 P.2d 809, Part IV, at 815 (Appendix D, infra, p. D-1, at D-12, 13). [4/] And on May 1, 1972, the Court of Criminal Appeals, noting (and for the reason) that Petitioner was indicating a resort to the Federal courts, summarily revoked all bail (see Appendix H, infra, p. H-1).

C. *The Federal Proceedings*

Thereafter the Federal action was filed, by the presently undersigned counsel, in the United States District Court for the Western District of Oklahoma, Case No. CIV-72-420. The Complaint alleged the issues summarized under "Questions Presented," supra, Numbers (1) and (2), and designated the action primarily a petition for a writ of habeas corpus, 28 U.S.C. 2241, and alternatively as a civil-rights action, 42 U.S.C. 1983, 28 U.S.C. 1343(3) and 1343(4), to *inter alia* adjudicate, 28 U.S.C. 2201, the State conviction to be contrary to Federal law, and void. For reasons never entirely clear to Petitioner, the District Court preferred to entertain the Complaint as sounding more in civil-rights, for a declaratory judgment of the State conviction's invalidity. And although the Complaint had named the Sheriff of Oklahoma County as the nominal defendant, the State Attorney General, also for reasons never entirely clear to

4. The Court of Criminal Appeals did, however, reduce the sentence to four years' imprisonment and a fine of $500.00. See p. D-14, 15, infra.

the undersigned counsel, expressed the desire that the three Judges of the Court of Criminal Appeals be impleaded as additional, more proper, parties defendant.

During the pleading phase of the Federal District Court action, the District Judge had ruled that the Petitioner's absence from physical custody was no jurisdictional defect (i.e., in reference to the fact that Petitioner's State bond had been revoked prior to, and in contemplation of, the filing of the Federal action; but that Petitioner was nevertheless still not in custody); and the pre-trial conference, the State (or "defendants") abandoned the contention that the Tenth Circuit's decision of *Lamb* v. *Brown*, supra, had reduced the juvenile age to 14.

After a non-jury trial held on January 23, 1973 (at which certain documentary evidence, such as certified birth certificates, court records, etc., were introduced), the District Court, on February 28, 1973, viewed *Lamb* v. *Brown*, 456 F.2d 18, supra, as absolutely prospective, even unavailable to similar non-final cases such as Petitioner's, pending on direct appeal; and therefore adjudicated Petitioner's instant conviction valid. *Ruhm* v. *Turner*, et al. (W.D. Okla., Feb. 28, 1973) 354 F.Supp. 324 (Appendix C, infra, p. C-1).

An appeal was thereupon taken to the United States Court of Appeals for the Tenth Circuit, and docketed as No. 73-1259. The Court of Appeals, however, on its own motion, announced that it would entertain the matter *only* as a habeas corpus, and in view of Petitioner's absence from physical custody, ordered the appeal "conditionally dismissed." Order of July 12, 1973, (Appendix A, infra, p. A-1). A telephone call to the Clerk for

elucidation of a "conditional dismissal" evoked the response that "it's kind of in limbo." About six months later, however, the Court of Appeals made the dismissal more-or-less final, indicating it would reopen the matter if the Petitioner should become incarcerated within thirty days. Order of February 4, 1974 (Appendix B, infra, p. B-1).

This Petition for a Writ of Certiorari ensued.

REASONS FOR THE ALLOWANCE OF THE WRIT

A. *Conflicts between the Circuits and with other Federal Law*

The primary "traditional" reason for the grant of Certiorari is, of course, that of a conflict between various Courts of Appeals. Rule 19 (1) (b). Such an embarrassing conflict is squarely presented by this Petition, to wit: the rule in the Tenth Circuit, both in this litigation, see 354 F. Supp. 324, Appendix C hereto, infra, p. C-1, and in the *Lamb* v. *Brown* decision itself, 456 F.2d 18, 20 (10th Cir., 1972), is that the adjudication in *Lamb* v. *Brown* of unconstitutionality in favoring some 16 to 18 year old offenders with juvenile status, while prosecuting the unfavored class of like-aged offenders as adults and felons, is not to be applied retroactively; while squarely *contra* thereto, in the Fourth Circuit, the decisions voiding a virtually identical Maryland discrimination between favored and unfavored 16 to 18 year old offenders, *Long* v. *Robinson* (D.Md., 1970) 316 F.Supp. 22, affirmed 436 F.2d 1116 (4th Cir., 1971), have been held fully retroactively available to those unfavored teen-aged offenders who had been discriminatorily prosecuted as adults, rather than as juveniles! *Woodall* v. *Pettibone* (4th Cir., 1972) 465 F.2d 49, *cert. den.* ____U.S.____, 93 S.Ct. 3054 (1973).

Indeed, not only is there a square conflict between the Tenth and Fourth *Circuits* with respect to the retroactivity of the *Lamb* v. *Brown*-type situation, there is now an embarrassing conflict between the judicial Districts *within* the Tenth Circuit regarding *Lamb* v. *Brown's* retroactivity. Thus, in the case at bar, the Hon. Fred A. Daugherty, Chief Judge for the Western District of Oklahoma, had held *Lamb* v. *Brown* non-retroactive, 354 F.Supp. 324, and Appendix C hereto; whereas in a similar case, to wit: *William Lynn Stringfield* v. *John Grider, Warden, et al.*, N.D. Okla., No. 72-C-236 (unreported, but reproduced at Appendix [redacted] hereto, infra p. [redacted]-1), the Hon. Allen E. Barrow, Chief Judge for the Northern District of Oklahoma, has held *Lamb* v. *Brown* fully retroactive inter alia on the inescapable basis of *Woodall* v. *Pettibone*, supra. (*Stringfield* is presently on appeal to the Tenth Circuit, Appeal No. 73-1550.)

In addition to these embarrassing conflicts not only between the Circuits, but also amongst the Districts within Oklahoma, Petitioner would also urge a direct conflict between the Tenth Circuit's view of its *Lamb* v. *Brown* decision, supra, 456 F.2d 18, 20, and the Supreme Court's more recent *Robinson* v. *Neil* (1973) 409 U.S. 505, wherein a unanimous Court, per Mr. Justice Rehnquist, reaffirmed the full retroactivity of constitutionally-based decisions as being "the general rule," 93 S.Ct. at 877, characterized prospectivity as an "exception," and stated that generally, substantive decisions are to enjoy full retroactivity - the restriction of prospectivity being limited to procedural decisions of certain particular types (e.g., those going to deterrence of police misconduct, courtroom procedure, or other purely procedural matters unrelated to "the integrity of the factfinding process").

And, if we view the substantive adjudication of *Lamb* v. *Brown*, supra, 456 F.2d 18, as in essence quashing the presumption of fact implicit in the discrimination therein, i.e., to the effect that the male teenager is, simply because of his sex, two years maturer in his criminal mentality and development than his female counterpart, and is for this "factual" reason held strictly accountable as an adult at age 16 while the similarly (or even worse) offending girl is presumed incapable of intentional evil until age 18 (see 10 O.S. 1971, §1112(b))- that is, viewed in this light, *Lamb* in essence quashed a sexually-founded "irrebutable factual presumption," *Cleveland Board of Education* v. *LaFleur* (1974) ___ U.S. ___, 94, S.Ct. 791, 798-800, cf. *Stanley* v. *Illinois* (1972) 405 U.S. 645, 654-657, in the same way that other, non-sex-related "irrational presumptions" are traditionally voided, see *Tot* v. *United States* (1943) 319 U.S. 463, *United States* v. *Romano* (1965) 382 U.S. 136, and *Leary* v. *United States* (1969) 395 U.S. 6, 30-54; and wherefore *Lamb* v. *Brown*, in voiding a fallacious and impermissible "deduction" of fact (i.e., of criminality, from anatomy) would in other Circuits have been held fully retroactive on the ground that "irrational presumption" decisions necessarily involve "the integrity of the factfinding process." *United States* v. *Scott* (9th Cir., 1970) 425 F.2d 55, 58-59 (en banc); *Vaccaro* v. *United States* (5th Cir., 1972) 461 F.2d 626, 633-634. Thus the Tenth Circuit's assertion that the irrational presumption of fact implicit in the *Lamb* v. *Brown* situation should not be voided retroactively is in substantial conflict with the decisions cited above to the contrary, from the Ninth and Fifth Circuits.

The Tenth Circuit's sentiment that the substantive criminal sexual discrimination involved in *Lamb* v. *Brown*

should not be retroactively voided is also contrary to the law elsewhere regarding the retroactivity of sexual discriminations in the administration of substantive criminal justice. The leading decisions on the basic unconstitutionality of sexual discriminations in the penal context are *Commonwealth* v. *Daniel* (1968) 430 Pa. 642, 243 A.2d 400, *U.S. ex rel. Robinson* v. *York* (D.Conn., 1968) 281 F.Supp. 8, *U.S. ex rel. Sumrell* v. *York* (D.Conn., 1968) 288 F.Supp. 955, *Liberti* v. *York* (1968) 28 Conn.Super. 9, 246 A.2d 106, *State* v. *Costello* (1971) 59 N.J. 334, 282 A.2d 748, and *State* v. *Chambers* (1973) 63 N.J. 287, 307 A.2d 78. It is interesting to note that *all* the sexually disparate penal schemes struck down in these cases have been applied fully retroactively: in Pennsylvania and Connecticut by confession of the Attorneys General of those States (unreported, but reproduced at Appendices J and K, hereto, infra. pp. J-1 and K-1); and in New Jersey, by the language within the *State* v. *Costello* opinion itself, 307 A.2d at 84.

Indeed, the present leading authority in the entire Nation on sexual equality in general, *Frontiero* v. *Richardson* (1973) 411 U.S. 677, a military pay decision, has been confessed to be fully retroactive by the Comptroller General of the United States himself. Opinion No. B-178979, August 31, 1973, supplemented February 1, 1974, 53 Comp.Gen._____, reproduced in extract form at Appendix H hereto, infra, p. H-1.

Thus, the non-retroactive application of *Lamb* v. *Brown* is in conflict not only with other Circuits, but with virtually every other authority, Federal, State, judicial, executive and administrative, that has spoken on the same and related subjects. *A fortiori*, the disallowance of *Lamb* v. *Brown* to this Petitioner, whose case was still pending and non-final in the State courts at the time of

the promulgation thereof, is even more so in conflict with controlling Federal authority on the subject. *Linkletter* v. *Walker* (1965) 381 U.S. 618, 626-627.

B. *Unsettled Questions which Ought to be Resolved by the Supreme Court*

In addressing himself to the broader policy behind the discretionary grant of Certiorari, that is, not so much whether the decision below be erroneous, but rather, whether it merits this Court's attention, Petitioner would first of all point out that the basic substantive questions posed by his State conviction challenged herein are two-fold: (1) the question of sexual equality before the law, especially in the administration of substantive criminal justice; and (2) the question of the retroactivity of favorable decisions, both regarding sexual equality, and regarding substantive criminal law.

Petitioner would submit that in view of such recent Supreme Court decisions as *Reed* v. *Reed* (1971) 404 U.S. 71, *Stanley* v. *Illinois* (1972) 405 U.S. 645, *Frontiero* v. *Richardson* (1973) 411 U.S. 544, and *Cleveland Board of Education* v. *LaFleur* (1974) ____ U.S. ____, 94 S.Ct. 791, there can be no lingering doubt as to the basic question of whether males and females as such are "persons" within the meaning of the Fourteenth Amendment, and fully entitled as such to the Equal Protection of the Laws as guaranteed therein. But these cases were all *civil*; and as yet there has been no Supreme Court decision upholding (or clarifying) the sexual Equal Protection principle in the *criminal* context. The last Supreme Court pronouncement on criminal sexual equality was *Hoyt* v. *Florida* (1961) 368 U.S. 57, which involved a

relatively mild *procedural* sexual discrimination (i.e., partial excusal of women from the jury panel). At bar, however, is a *substantive* discrimination based on sex, a far more serious matter, and thereby presenting a vastly clearer situation for the Court to use as a vehicle with which to explore sexual Equal Protection's applicability to criminal justice.

In addition, and considering the wide prevalence of sexual discriminations in our past as well as the surge of recent decisions voiding same, it is abundantly obvious that the question of the retroactivity of these new sex-equality decisions will *inevitably* arise, and will ultimately *have* to be definitely decided by no less than the Supreme Court itself. Again Petitioner submits that the instant sexual discrimination that has victimized him, being in the administration of substantive criminal justice, and severely so at that, presents the stark, clear-cut case at the hardship end of the sex-discrimination spectrum that can easily constitute a "most obvious" case for retroactivity, or, if retroactivity is to be denied, can at one blow resolve the entire retroactivity question over the entirety of the less extreme remainder of the sex-equality spectrum under the "*a fortiori*" approach. Moreover, the instant Petition, involving the retroactivity *vel non* of a sex-equality *decision* (i.e., *Lamb* v. *Brown*, supra, 456 F.2d 18) to a case that was still "non-final" as per pendency on direct appeal, presents the "half-way" situation that the Court might very advisably find the more prudent vehicle to employ for a first pronouncement on the broad, yet inevitable, question of the retroactive effect of the modern sex-equality doctrines.

Another interesting and unusual aspect of the sex-equality question at bar is that it does not turn *exclusively* on the Equal Protection Clause of the Fourteenth Amendment. Additionally, Petitioner's case also presents a clear-cut Nineteenth Amendment question, which has rarely attracted the Supreme Court's attention since the 1920's; and, being a sexually disparate sentencing (or penal) discrimination, it also raises the "[enhanced] punishment-for-biological-status" question of *Robinson* v. *Califonia* (1962) 370 U.S. 660, which the Court has not touched upon since *Powell* v. *Texas* (1968) 392 U.S. 514.

Other issues as yet unresolved by the Supreme Court include the equal-employment portions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., in the context of the validity of State statutes which *require* prospective employers to discriminate of the basis of sex (that is, since male teenagers only are barred for life, by their discriminatory designation as "felons," from a number of occupations in Interstate Commerce, prospective employers in those occupations *may* not hire these teenaged male ex-offenders even if they wish to, although such employers are quite free to hire equally-ex-offending females, who were only "adjudicated" to be "deliquents," without other loss of civil rights, or legal disqualifications).

Finally, Petitioner would submit that since the *Lamb* v. *Brown* decision, supra, 456 F.2d 18, in effect voided Oklahoma's adult courts' *jurisdiction* over offenses committed by males 16 to 18.[5/] then the instant case would

---

5 See footnote 3, supra, p. 9.

also be an excellent means for resolving the question that troubled the Justices in their varying opinions to *Gosa* v. *Mayden* (1973) 413 U.S. 665, i.e., of the retroactivity vel non of a decision quashing a tribunal's "jurisdiction" over certain classes of offenses (or offenders), when "jurisdiction" is meant in the classical sense of true adjudicatory power.

C. *Certain Unsettled Procedural Questions*

Regarding the procedural questions that have arisen during the course of this litigation, the instant case, which attacked Petitioner's State conviction by the civil-rights and declaratory-judgment procedure, *after* exhaustion of State remedies, and *without* objection by the State's attorney, would provide a quick means for resolving the outer limits of the Court's recent decision of *Preiser* v. *Rodriguez* (1973) 411 U.S. 475, which held that the civil-rights declaratory-judgment route is not proper *when indulged in to evade the exhaustion requirement of habeas corpus*, 28 U.S.C. 2254(b).

And finally, as for the Court of Appeals' dismissal of Petitioner's statutory appeal because of his apparently voluntary absence from custody, the Tenth Circuit outlook appears to derive ultimately from *Eisler* v. *United States* (1949) 338 U.S. 189, which appears to state that a court vested with *discretionary* appellate jurisdiction may, in the case of a fugitive, order his case "removed from the docket." Apparently, *Eisler's* reference to the "removal from the docket" had the overtone of "postponing review indefinitely," as opposed to outright dismissal. The Court's basis for its rather indefinite action apparently related to the equally cryptic ground that the petitioner therein "*may* have rendered moot any

judgment on the merits." Two Justices dissented, urging that the indefinite postponement procedure only applied in cases of conventional jailbreaks, etc., but that Eisler's flight from the Country should have mandated outright dismissal. Two other Justices dissented, however, on the grounds that flight certainly did not constitute a *jurisdictional* defect at the appellate level, and that the Court should therefore have gone ahead, exercised its jurisdiction, and rendered its opinion on the merits.

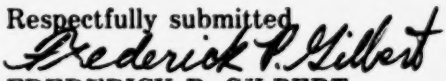
Given the indefinite teaching of *Eisler*, it is not surprising that the various Circuits have reached varying interpretations thereof. Thus, while the Tenth Circuit has viewed Petitioner's absence as a basis for dismissing his appeal below, the Fifth Circuit has reached a rather contrary result. *McKinney* v. *United States* (5th Cir., 1968) 403 F.2d 57.

Since Petitioner's action before the Tenth Circuit was a statutory civil appeal as of right, 28 U.S.C. 1291, Federal Rules of Appellate Procedure Nos. 3, 4, with no authority appearing elsewhere in the statutes or Rules for the dismissal thereof on the basis asserted by the Court of Appeals, Petitioner would urge that the whole matter of dismissing civil and collateral-type appeals on the basis of reasons not authorized by statute or Rule be resolved by the Court, especially in view of the conflicts between the Circuits being generated by the as yet unresolved ambiguousness of *Eisler* v. *United States*, supra.

* * *

WHEREFORE, Petitioner prays that a Writ of Certiorari do issue.

Respectfully submitted,



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Attorney for Petitioner

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM — JULY 12, 1973

Before Honorable David T. Lewis, Chief Judge, Honorable John C. Pickett, Senior Circuit Judge, and Honorable Oliver Seth, Circuit Judge.

No. 73-1259

MYER AARON RUHM,
Plaintiff-Appellant,

v.

BOB TURNER, Sheriff,
Oklahoma County, Oklahoma,
HON. HEZ BUSSEY, HON TOM
BRETT, and HON. ROBERT D.
SIMMS, Judges of the Court
of Criminal Appeals, State of Oklahoma,
Defendants-Appellees.

Upon consideration of the files and record in this case, it is ordered that the appeal is conditionally dismissed. See United States v. Neal, 453 F.2d 344.

The mandate shall issue forthwith.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS,
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY TERM — FEBRUARY 4, 1974

Before Honorable David T. Lewis, Chief Judge, and Honorable Oliver Seth, Circuit Judge.

No. 73-1259

MYER AARON RUHM,
Plaintiff-Appellant,

v.

BOB TURNER, Sheriff, Oklahoma County, Oklahoma, HON. HEZ BUSSEY, HON. TOM BRETT, and HON. ROBERT D. SIMMS, Judges of the Court of Criminal Appeals, State of Oklahoma,
Defendants-Appellees.

This matter comes before the Court upon the motion of the Appellees for unconditional dismissal of the appeal in the captioned cause.

Upon consideration whereof, it is the ORDER of this Court that the appeal is dismissed; however, the Court will entertain a motion to reconsider this Order if the appellant returns to custody within thirty (30) days from this date.

HOWARD K. PHILLIPS, Clerk

/s/ Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

APPENDIX C

[Ruhm v. Turner, et al. (W.D. Okla., 1973) 354 F.Supp. 324]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 72-420 Civil

MYER AARON RUHM,
Plaintiff,

vs.

BOB TURNER, Sheriff,
Oklahoma County, Oklahoma, et al.,
Defendants

MEMORANDUM OPINION

Plaintiff was convicted as an adult in the District Court of Oklahoma County, Oklahoma on November 17, 1970 of the crime of possession of marihuana. Shortly thereafter he was fined and sentenced to imprisonment. At the time of his conviction Plaintiff was seventeen years of age. During the pendency of Plaintiff's appeal in the State Courts, the United States Court of Appeals for our Circuit on March 16, 1972 decided the case of *Lamb* v. *Brown*, 456 F.2d 18 (Tenth Cir. 1972). This decision held 10 Oklahoma Statutes 1101(a) (Suppl. 1969) which provided in pertinent part:

> "The term 'child' means a male person of the age of sixteen (16) years and a female person under the age of eighteen (18) years."

to be unconstitutional as violating the equal protection clause of the Federal Constitution. This Opinion also stated:

"This ruling shall not apply retroactively."

In 1970 the Oklahoma Legislature amended the above law by enacting 10 Oklahoma Statutes §1101A which provides in pertinent part:

> "The term 'delinquent child' means (1) a male person under the age of sixteen (16) years and a female person under the age of eighteen (18) years who has violated a Federal or state law or ordinance ***."

Plaintiff was tried when 10 Oklahoma Statutes §1101A was in effect. However, the decision in *Lamb* as applied to 10 Oklahoma Statutes, §1101A results in this Statute also being unconstitutional. The Oklahoma Court of Criminal Appeals so held in *Schaffer* v. *Green*, 496 P.2d 375 (Okl. 1972).

The Plaintiff presented the *Lamb* decision to the Oklahoma Court of Criminal Apeals while his appeal was being considered by that Court and urged its application to overthrow his conviction and sentence. The Oklahoma Court of Criminal Appeals rejected Plaintiff's request holding, in effect, that as Plaintiff was tried, convicted and sentenced at the trial level before *Lamb* and as *Lamb* by its language was not to be applied retroactively, the decision did not apply to Plaintiff's conviction or their appellate review in such circumstances. The Oklahoma Court of Criminal Appeals on April 11, 1972 affirmed Plaintiff's conviction but reduced the sentence as it has authority to do under Oklahoma law. *Ruhm* v. *State*, 496 P.2d 809 (Okl. 1972). Plaintiff is a fugitive from justice as he has not turned himself in following the

said State affirmance of his case. Plaintiff proceeds herein under the Civil Rights Act (42 U.S.C. §1983)[1] claiming that the Defendants under color of State law have deprived him of his Federal constitutional right to the equal protection of the laws. Defendants deny the accusation.

The Court has conducted an evidentiary hearing herein. The sole question involved is whether the United States Court of Appeals for the Tenth Circuit by providing in *Lamb* that its decision therein was not to be applied retroactively meant that its decision should or should not apply to a case in which conviction and sentence at the trial level had been concluded but which case was pending on appeal at the time its decision was announced.

The Annotation, Prospective or Retroactive Operation of Overruling Decision, 10 ALR 3d §1371 teaches that a Court has the power to completely deny retroactive effect to an overruling decision.

> "§7. Power of court to completely deny retroactive operation
>
> (A) Generally
>
> Although there has been a traditional policy in favor of giving unlimited retroactive effect to an overruling decision, it is now generally recognized that a court has the power to go to the

---

1 Paragraph 1 of the Pre-Trial Order entered herein on December 5, 1972 provides:

> "1. This is a civil-rights action brought under 42 U.S.C. 1983 for a declaratory judgment to adjudicate Plaintiff's State conviction herein, previously affirmed as *Ruhm* v. *State* (Okla. Cr., No. A-16390, Apr. 14, 1972) 496 P.2d 809, to be null and void; and for certain ancillary relief."

> opposite extreme, and to overrule a case purely prospectively and give the overruling decision no retroactive effect whatsoever, that is, to hold that the rule established by the overruling decision no retroactive effect whatsoever, that is, to hold that the rule established by the overruling decision will operate only upon future transactions or events and will not even be operative upon the parties to the overruling case."

Also see *Linkletter* v. *Walker*, 381 U.S. 618 (1965).

As stated above the United States Court of Appeals for the Tenth Circuit decided that its ruling in *Lamb*, "shall not apply retroactively". In reaching this decision it is, of course, assumed that our Court of Appeals considered the pertinent pronouncements of the United States Supreme Court as to what should be considered in determining the retroactivity or non-retroactivity of a decision which overrules existing law. In *Stovall* v. *Denno*, 388 U.S. 293 (1967) the United States Supreme Court announced:

> "....The criteria guiding resolution of the question (retroactivity or non-retroactivity) implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. '[T]he retroactivity or non-retroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevit-

> ably vary with the dictate involved.' Johnson v. New Jersey, supra, 384 U.S. at 728, 16 L.Ed.2d at 889."

Also see *Desist* v. *United States*, 394 U.S. 244 (1969) and *Williams* v. *United States*, 401 U.S. 646 (1971). It would therefore appear safe to conclude that our Court of Appeals has determined that its ruling in *Lamb* does not meet the pertinent criteria for retroactive application.

The Annotation, Prospective or Retroactive Operation of Overruling Decision, *supra* also teached:

> "Moreover, although there has traditionally been a presumption that an overruling decision is intended to receive general retroactive effect, the more modern view is that unless the overruling court expressly indicates in the overruling case to what extent the overruling decision is to be given retroactive effect, *lower courts are entitled to reach their own conclusions as to the issue of retroactivity until the overruling court expressly clarifies how much retroactive effects its overruling decision is to receive.*" (Underscoring supplied).

In *Johnson* v. *New Jersey*, 384 U.S. 719, 16 L.Ed.2d 882, 86 S.Ct. 1772 (1966), the court stringently limited the retroactivity of *Escobedo* v. *Illinois*, 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758 (1964) and *Miranda* v. *Arizona*, 384 U.S. 436, 16 L.Ed. 694, 86 S.Ct 1602 (1966) to those cases in which trial began after the date of each decision. The retroactivity of *Miranda* was even more limited in *Jenkins* v. *Delaware*, 395 U.S. 213, 23 L.Ed.2d 253, 89 S.Ct. 1677 (1969), which held that the *Miranda* rule did not apply to retrial of cases in which the original trial had commenced before the date of *Miranda*. But in some cases, denial of retroactivity has been extended

even to dates prior to the commencement of trial. In *Williams* v. *United States, supra,* the Court refused to apply *Chimel* v. *California,* 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034 (1969), relating to unlawful search at the time of arrest, to any *search* conducted before the date of the *Chimel* case. However, although *Chimel* received the benefit of the change in the law, subsequent cases then pending on appeal did not. Nor can the decision be used in a collateral attack.

The Court therefore finds and concludes that the ruling in *Lamb* was not meant to be applied retroactively to any case which had been concluded at the trial level when the same was announced; that the prohibition against retroactive application as announced in *Lamb* applies to Plaintiff's case even though it was pending on appeal when the ruling was made in *Lamb* inasmuch as Plaintiff's trial had been concluded when the ruling in *Lamb* was announced; that the Oklahoma Court of Criminal Appeals in *Ruhm* v. *State, supra,* correctly interpreted the meaning and intent of our Court of Appeals ruling that *Lamb* shall not be applied retroactively and correctly applied such interpretation to Plaintiff's case on appeal; and, that Defendants have not subjected Plaintiff to the deprivation of any rights, privileges, or immunities secured to him by the Constitution and laws of the United States.

Plaintiff's action is therefore dismissed.

It is so ordered this 28th day of February, 1973.

/s/ Fred Daugherty
Fred Daugherty
United States District Judge

APPENDIX D

[Ruhm v. State (Okla.Cr., 1972) 496 P.2d 809]

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

No. A-16, 390

MYER AARON RUHM,
Plaintiff in Error,

vs.

THE STATE OF OKLAHOMA,
Defendant in Error.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA, HONORABLE ROBERT L. BERRY, JUDGE.

Plaintiff in Error, MYER AARON RUHM, was tried by a jury in the District Court of Oklahoma County, Oklahoma and found guilty of Possession of Marijuana, and sentenced to serve seven (7) years in the state penitentiary and fined Two Thousand Five Hundred Dollars ($2,500), and he appeals. Judgment and sentence MODIFIED from seven (7) years to four (4) years imprisonment, and the fine from Two Thousand Five Hundred Dollars ($2,500) to Five Hundred Dollars ($500), and as MODIFIED, the Judgment and Sentence is AFFIRMED. MODIFIED & AFFIRMED.

OPINION

SIMMS, Judge:

Defendant in Error, Myer Aaron Ruhm, was convicted in the District Court of Oklahoma County, Oklahoma of Possession of Marijuana. A jury found the defendant guilty, fixed punishment at seven (7) years in the penitentiary, and assessed a fine of Two Thousand Five Hundred Dollars ($2,500), from which judgment and sentence a timely appeal has been perfected to this court.

Evidence on trial was that on August 5, 1970, Oklahoma City Police Department Narcotics Officers Jerry Legg and Charlie Acox observed the defendant in a group of 15 to 20 people congregated in the 3000 Block on North Paseo Street in Oklahoma City, Oklahoma County, Oklahoma. The officers directed the group to disperse, which it did.

The defendant proceeded to his automobile, and the officers did likewise. The police officers proceeded in a southerly direction on Paseo Street, and upon crossing the intersection of Northwest 29th and Paseo Streets, they heard the sound of an automobile taking off at a high rate of speed, at which point the officers stopped and backed up into the intersection of 29th and Paseo and gave pursuit to a vehicle they saw approximately 100 yards away traveling west on 29th Street, approaching Shartel Street. At the time the officers undertook pursuit, they did not know the identity of the person driving the vehicle. The officers observed that the vehicle did not have a license plate light. They observed the vehicle stop at the stop sign at 29th and Shartel, at which time the vehicle made a right turn and proceeded north on Shartel with the officers in pursuit. The police officers

caught up with defendant's vehicle as it crossed 30th Street, heading north, and then the defendant's vehicle made a wide turn onto Northwest 31st Street in an easterly direction and drove left of center on that street, at which point the officers put the "red light" on the vehicle and stopped the car midway in the first block on 31st Street, east of Shartel. Officer Acox proceeded to the driver's side of the vehicle, while Officer Legg proceeded to the passenger's side of the defendant's vehicle. Officer Acox ordered the defendant to dismount from his automobile, advised him that he was under arrest for three traffic violations, and asked him to produce a driver's license. When the request was made, the defendant turned and reached under the front seat of his automobile; at that point, Officer Legg, who thought the defendant might have been reaching for a weapon, opened the passenger's side door on the vehicle and leaned into the car, where he observed a partially burned marijuana cigarette lying on the floorboard under the front seat. A search for weapons produced nothing. The defendant was placed under arrest for possession of marijuana, and a further search of the car revealed five marijuana seeds in the crease between the back rest and the front seat. The defendant was then transported to police headquarters where he was booked in on the felony, and additionally cited for improper turn, improper equipment, driving left of center, and no state driver's license, which charges were subsequently dismissed.

The defendant testified that he kept his driver's license under the front seat, and later on found his driver's license under the front seat after his arrest and prior to trial. The defendant's testimony with regard to his turning and reaching under the front seat of the automobile at the time he was asked for his driver's

license did not differ substantially from that of the police officers. The defendant also testified that he had seen and had smoked marijuana on occasions and admitted misdemeanor convictions for uttering a forged instrument to obtain a stimulant, as well as attempting to obtain a stimulant by fraud and deceit. He denied any knowledge of the marijuana found in his vehicle.

Approximately six months after perfecting the appeal in this case and filing briefs, in May, 1971, the defendant obtained additional appellate counsel and filed on January 26, 1972, a supplemental brief which was thereafter, on February 25, 1972, the subject of a supplemental answer brief on behalf of the State of Oklahoma. Since new and additional questions are raised in the supplemental brief, they will also be treated.

I.

Defendant contends initially that the trial court erred in failing to sustain the motion to suppress the evidence as the fruit of a subterfuge arrest and subsequent illegal search and seizure.

The motion to suppress was filed after the preliminary hearing and prior to trial, but no hearing was had until the trial, at which time the jury was excluded and the two arresting officers were called in support of said motion, which motion was overruled by the trial judge, and properly so in this Court's opinion.

The law is settled in Oklahoma that where a defendant files a motion to suppress, the burden is upon him to offer any evidence in support of the allegations contained in the motion, and further, that the question of suppressing evidence is a judicial one based on the facts and circumstances in each case, and this Court will not

reverse the trial court on a question of fact where there is competent evidence reasonably tending to support the finding of the court. *Bagwell* v. *State*, Okl.Cr., 327 P.2d 479 (1958).

Defendant contends that because the officers "heard" an automobile take off at a high rate of speed and trailed the defendant's automobile approximately four blocks before stopping him (at least half of which was in pursuit) and then arrested him for three traffic violations committed in their presence, the arrest was a "subterfuge for conducting the search."

The evidence in the record simply fails to support this contention. First, there is no showing that the officers either knew who was in the vehicle or suspected there was any contraband in the automobile. The only testimony, and it was uncontradicted, is that the officers observed the violations and arrested the defendant for same. The defendant did not deny the traffic violations.

In support of his argument, the defendant cites *Bagwell*, supra, *Fields* v. *State*, Okl.Cr., 463 P.2d 1000 (1970), *Lawson* v. *State*, Okl.Cr., 484 P.2d 1337 (1971), and in the supplemental brief, *Brumley* v. *State*, Okl.Cr., 484 P.2d 554 (1971).

The factual distinctions between the cases cited by the defendant and the instant case are patent.

In *Bagwell*, supra, the officers observed a violation, gave pursuit, and stopped the defendant after a high-speed, bullet-punctuated chase, and searched his automobile after both smelling and seeing the illicit whiskey. The court there affirmed the conviction despite allegations the traffic arrest was subterfuge after the officers *and* the defendant testified as to the motion to suppress. (Emphasis Added). In *Fields*, supra, the officers testified

that they followed the defendant 11 blocks and waited behind him at a red light before making the arrest, based on a defective tail light, which defect was refuted by testimony, and "suspicious" movements. There the court suppressed the evidence, a hand gun, found in the glove box after the defendant left his vehicle. This Court, in the *Fields* Syllabus, stated:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist or effect his escape."

In connection with the *Fields* case, defendant in both briefs makes much of the fact that the traffic citations in the instant case were dismissed and not prosecuted, since the *Fields* decision, supra, stated such was indicative of a lack of conclusive evidence of a misdemeanor violation.

We note that at pages 24, 25, and 26 of the preliminary hearing transcript, Officer Legg testified that on the day the traffic violations were to be tried, he was involved in an investigation on South Shields Street in Oklahoma City, his vehicle broke down, and he was unable to get to the court on time. He testified he did not use his police radio to seek a continuance because he felt he could still get to court on time.

The facts in *Brumley*, supra, bear no resemblance to the case at bar inasmuch as the officers observed suspicious activities at a motel and then trailed the defendant's automobile 14 blocks before they observed the car straddle the center line on a three-lane divided highway. The officers obviously were looking for a pretext to stop the automobile, especially since they

jailed both the driver and his passenger for the violation.

Finally, the defendant cites the *Lawson* case wherein the defendant was convicted of narcotics possession. Lawson was the passenger in a vehicle stopped for a ten-mile-per-hour speeding violation and no tag light. After the driver and Lawson were removed from the auto, officers seized a hatchet, which had been in plain view, from the front floorboard. Also seized, and the subject of the major complaint, was a brown alligator bag taken from the back floorboard in a "search for weapons." Only after the bag was seized and opened was Lawson arrested.

Syllabus Number One in *Lawson* states:

> "*Ordinarily*, a minor traffic violation will not support a search and seizure." (Emphasis Added).

Judge Nix concluded his opinion in *Lawson*, supra, as follows:

> "Therefore, we reaffirm that on arrest for a traffic violation there is not lawful predicate for a search of the driver or the vehicle *absent special circumstances* where the officer has probable cause to search the area in which the *arrestee may reach for a weapon****." (Emphasis Added).

The testimony in the instant case, corroborated by the defendant, indicates that it was the defendant himself, in the act of reaching under the front seat, who provided those special circumstances which immediately ripened into the necessary and probable cause to justify the officer's entry into the automobile.

Considering the circumstance, pre-dawn hours, and stopping an individual recognized at the time to be a

person involved with drugs, it would have been unreasonable for the officers to do anything other than they did in the interest of their own safety.

Had the arrest been a subterfuge, as defendant contends, the officers, once they had recognized the defendant, would have searched his person for contraband. The evidence reflects no intention on the part of the officers whatsoever to search the automobile or the defendant, or to do anything but routinely cite him for the variety of traffic offenses they viewed in the four-block chase until the defendant himself committed an act which caused the officers to react in what we hold was a perfectly reasonable and logical manner. How many traffic violators turn and reach under the front seat when asked to produce a driver's license?

Under the facts of this case, and in particular the behavior of the defendant, it would have been clearly unreasonable to deny the officers the right to take those measures necessary to determine whether or not the defendant did, in fact, have a weapon under the front seat of the automobile. Inasmuch as we find that the search was reasonable, therefore the evidence found was admissible.

II.

Defendant's second contention, in both briefs, is that the trial court erred in overruling defendant's demurrer to the evidence and that the state failed to prove a material element, i.e., the willfulness of the possession based upon facts showing knowledge of the contraband, as well as dominion and control over same. The lone authority cited is *Brown* v. *State*, Okl.Cr., 481 P.2d 475 (1971).

In the *Brown* case, supra, Brown was arrested upon entering the apartment of another person, in the company of that person, after officers, searching the unoccupied dwelling under color of a search warrant, found marijuana. Brown had slept on the couch the previous night.

In reversing Brown's conviction for possession of marijuana, Judge Nix stated that from mere presence in the premises where contraband is found, without exclusive access, use, or possession of the premises, it may not be inferred that the individual knew of the presence. In this case, defendant likens the apartment in *Brown*, supra, to the defendant's automobile. The defendant testified that he did not know how the partially burned marijuana cigarette and the marijuana seeds got in his car, and that he had no knowledge of same. He testified that he has on occasions allowed other persons to use and ride in his automobile. He argues, in view of the foregoing, plus the officers' testimony that he did not appear to be under the influence of any intoxicant at the time of his arrest, that the state has failed in its burden.

The defendant does not contradict the facts that at the time the contraband was found, as distinguished from *Brown*, supra, he was the only person in the automobile, and that he had exclusive use, possession, and access to the conveyance in which the marijuana was discovered.

Since the defendant was in that circumstance, and following the case he cites, from that exclusive access, use, and possession, the jury could infer that the defendant had knowledge of the presence of marijuana and control of same, without showing additional factors.

But, there were additional factors and circumstances. Defendant admits having seen marijuana and

knew what it looked like; he also admits having used marijuana, and he presented no evidence to corroborate the access others had to his automobile.

Both *Brown*, supra, and the case relied upon by the state, *Hulsey* v. *State*, Okl.Cr., 307 P.2d 553 (1957) stand for the proposition that fact situations are fact questions for the jury. In *Brown*, supra, we said possession may be proved by circumstantial evidence, and in *Hulsey*, supra, we said in the first Syllabus:

> "1. ***Where there is a basis in the evidence from which the jury could conclude the accused is guilty as charged, the Criminal Court of Appeals will not disturb the conviction for insufficiency of evidence."

The defendant also claims there is a conflict between two statutes, 63 O.S., §451, the section dealing with marijuana, possession under which this prosecution was had, and 63 O.S., §649, dealing with the use aspect of drugs. Since this case deals only with possession, defendant's arguments have here neither relevance, nor materiality.

III.

The defendant's next proposition is two-fold and combines the errors asserted under one heading in the original brief and two headings in the supplemental brief. The primary thrust of the defendant's argument is that the court committed error in allowing the state to cross-examine the defendant as to two (2) prior misdemeanor convictions involving stimulants, that such evidence is inadmissible, and that emphasis upon those convictions during the state's closing argument resulted in a denial of the defendant's fundamental right to a fair trial on the offense charged.

Taking the second contention first, the question of the propriety of the state's argument is improperly before us in that no objection was ever made to either portion of the state's argument. The law in Oklahoma requires not only that objection be timely made, but also that the defendant go further and move the objectionable matter be stricken from the jury's consideration. Thus, the matter was not properly preserved for appeal. *Kuerschner* v. *State*, Okl.Cr.,____ P.2d ____, 43 O.B.J. 685 (1972). See also *Gaddis* v. *State*, Okl.Cr., 447 P.2d 42 (1968). Further, defendant is quite correct in observing that this Court will not consider questions raised for the first time on appeal. *Carothers* v. *State*, Okl.Cr., 299 P.2d 546 (1956).

As to the primary portion of this proposition, that the court erred in allowing evidence of prior unrelated convictions to be admitted, the response of the Attorney General is well taken.

As he points out, there is statutory authority, 12 O.S., §381, and case law directly in point. *Gable* v. *State*, Okl.Cr., 424 P.2d 433 (1967) and *Gilmore* v. *State*, 365 P.2d 573 (1961).

Title 12 O.S., §381, provides:

> "No person shall be disqualified as a witness in any civil action or proceeding, by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of crime; *but such interest or conviction may be shown for the purpose of affecting his credibility.*" (Emphasis Added).

In *Gilmore*, supra, we construed the statute as it affects a criminal case and the credibility of the defendant.

The authority urged by the defendant in both briefs, *Hardin* v. *State*, Okl.Cr., 462 P.2d 357 (1969) is distinguishable from the case at bar inasmuch as the matter complained of there concerned evidence of other *crimes*, rather than *convictions* for other crimes. (Emphasis Added).

We note additionally that the jury was properly instructed as to the manner in which they were to consider the defendant's testimony of his prior convictions, that is, only as they affect the weight and credibility of his testimony as a whole.

IV.

Under the headings Roman Numerals V. and VI. in his supplemental brief defendant contends, without any supporting evidence in the record, that he was seventeen at the time of the commission of the instant offense, and he was entitled to be proceeded against as a juvenile under 10 O.S., §§ 1101--1506, since he was not certified as an adult in accord with those sections. Further, defendant claims a denial of his Fourteenth Amendment rights to due process and equal protection by virtue of those statutes cited, supra, which exempt females 16 and 17 years of age from adult criminal prosecution, while subjecting males of the same age to that prosecution.

Once again, the defendant is quite right in his citations to the long line of authority which hold that this Court will not consider such questions when they are not raised below and preserved for this Court in the motion for new trial and the Petition in Error. Such questions raised for the first time on appeal are simply improperly before us for consideration.

Also improperly before this Court is a motion filed by the defendant March 24, 1972, styled "Motion to Correct Unconstitutional Sentence."

That motion alludes to a decision by the United States Court of Appeals, Tenth Circuit, handed down on March 16, 1972, in the matter of *Lamb* v. *Brown*, 71-1355, 456 F.2d 18, which held:

> "Because the purpose of the disparity in the age classification between 16-18 year old males and 16-18 year old females has not been demonstrated, we hold that 10 Okl.St.Ann. §1101 (a) is violative of the equal protection clause. *This ruling shall not apply retroactively.*" (Emphasis Added).

Thus, had the defendant timely raised his contentions, the last sentence of the *Lamb* opinion would have barred him from partaking of its benefits.

Further, in response to the Tenth Circuit's ruling, this Court spoke of the same and related topics on March 27, 1972, in *Schaffer* v. *Green*, 496 P.2d 375 (A-17,216).

In *Schaffer*, supra, the Court stated:

> "The opinion *** erases any question concerning the validity of any conviction had upon a male child of the age of sixteen (16) or seventeen (17) without a juvenile hearing prior to the opinion of the Court of Appeals, 10th Circuit, and as well, any conviction *** between the 10th Circuit opinion and the date of this opinion. This be true even if the opinion of the Federal Court was treated as retroactive, rather than prospective, in application."

V.

There remains but one contention, raised in both briefs of the defendant, untreated. The defendant contends that the punishment is excessive, not supported by the evidence, and given under passion and prejudice. In the initial brief, the defendant cites no authority to support his position, and in the supplemental brief he cites *Gable* v. *State*, Okl.Cr., 424 P.2d 433 (1967), which stands for the proposition that the punishment imposed must bear direct relationship to the nature and circumstances of the offense committed.

The defendant has failed to point out the distinction between *Gable*, supra, where the jury was unable to fix punishment and left it to the court's discretion, and the instant case, where the court imposed the sentence and fine recommended by the jury.

It is well settled in Oklahoma that where the verdict imposed is with the limits of punishment fixed by the Legislature, in this case seven (7) years imprisonment and a Five Thousand Dollar ($5,000) fine, that the jury verdict should not be disturbed. Further, excessiveness of punishment must be determined by a study of the facts and circumstances in each case, and we do not have the power to modify sentence, unless it shocks the conscience of this Court. *Johnson* v. *State*, Okl.Cr., 386 P.2d 336 (1963).

While it cannot be said that the Court's conscience is shocked in this instance, upon consideration of all the facts and circumstances surrounding this conviction, as well as a thorough reading of both transcripts, it is the opinion of this Court that justice would be better served if the sentence imposed in this case is modified from seven (7) to four (4) years imprisonment, and the fine

from Two Thousand Five Hundred Dollars ($2,500) to Five Hundred ($500), and as MODIFIED and free of any error requiring reveral, the judgment and sentence is AFFIRMED. MODIFIED & AFFIRMED.

BUSSEY, P. J., Concurs.

BRETT, J.: Concurs in part and dissents in part.

Insofar as this conviction is to be affirmed, I concur in that part that modified the sentence imposed. However, notwithstanding the provisions of 63 O.S. Supp. 1971, §2-601, I believe this sentence should be modified to one year imprisonment, as presently provided for the first conviction for possession of marihuana, since it was not a final judgment when the law was charged.

I agree also, under the circumstances the officers acted within reason, when the defendant reached under his car seat. At that moment they had no reason to believe he was reaching for his drivers license. He could have been reaching for a weapon, which provided the special circumstances referred to in *Lawson* v. *State*, supra.

It strikes me that the finding of a marihuana "roach", one quarter of an inch long, more nearly indicates proof of "the use of marihuana," than it does possession. One quarter of an inch is approximately six millimeters, which doesn't represent much marihuana. The record also reflects that the seeds were not absolutely proved to be marihuana seeds. The bureau expert did not test them, except to examine them under a microscope; and he related that other seeds do resemble marihuana seeds.

With reference to Part IV of the majority opinion concerning the defendant's question of jurisdiction, jurisdiction of the subject matter may be raised at any time, even on appeal. Therefore, I shall reaffirm my position expressed in *Schaffer* v. *Green*, supra, in that I believe the Schaffer decision is incorrect; and I feel no special compulsion at this time to change my position, except to admit that the majority of this Court has decided the 1910 Statute, 21 O.S. §152, is applicable.

Therefore, I concur in that part of the decision which modifies the sentence, but I respectfully dissent to the question of jurisdiction.

APPENDIX E

Relevant Provisions of the Constitution of the United States

The Fourteenth Amendment to the Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Nineteenth Amendment provides:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

The Eighth Amendment provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

APPENDIX F

Extract from Title VII to the Civil Rights Act of 1964
42 U.S.C. 2000e et seq

§ 2000e—2. Discrimination because of race, color, religion, sex, or national origin.—(a) It shall be an unlawful employment practive for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, *sex*, or national origin.

APPENDIX G

Extracts from the Charter of the United Nations, 59 Stat. 1035 (ratified 1945)

"WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

To save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, *in the equal rights of men and women* and of nations large and small.....

* * *

Chapter I: Purposes and Principles

Article 1.

The Purposes of the United Nations are:

* * *

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian nature, and in promoting and encouraging respect for human rights and for fundamental freedoms for all *without distinction* as to race, *sex*, language, or religion....

* * *

Chapter IX: Internation Economic and Social Cooperation

Article 55.

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations between nations based on respect for the principle of *equal rights* and self-determination of peoples, the United Nations shall promote:

* * *

c. universal respect for, and observance of, human rights and fundamental freedoms for all *without distinction as to* race, *sex*, language, or religion.

Chapter XII: International Trusteeship System

Article 76.

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

* * *

c. to encourage respect for human rights and for fundamental freedoms for all *without distinction as to* race, *sex*, language, or religion, and to encourage recognition of the independence of the peoples of the world....."

APPENDIX H

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

No. A-16,390

MYER AARON RUHM,
Plaintiff in Error,

vs.

THE STATE OF OKLAHOMA,
Defendant in Error.

ORDER DENYING BOND

WHEREAS, it is anticipated that an appeal to Federal District Court or the United States Supreme Court may be forthcoming in the above-styled and numbered cause on a jurisdictional question;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that bond, pending any further proceedings in any Court, be, and the same is, hereby DENIED.

WITNESS MY HAND AND SEAL OF THIS COURT this 1st day of May, 1972.

/s/ Hez J. Bussey
Presiding Judge

/s/ Robert D. Simms
Judge

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

72-C-236

WILLIAM LYNN STRINGFIELD,
Petitioner,

vs.

JOHN GRIDER, Warden, Oklahoma State Reformatory, Granite, Oklahoma
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ENTRY OF JUDGMENT

THE COURT, having examined the files and records of this proceeding, together with the files and records in State of Oklahoma vs. William Lynn Stringfield, Case No. CRF-71-27 in the District Court of Tulsa County, State of Oklahoma, including the transcript of the proceedings had in said matter, and the Second Report of the United States Magistrate concerning the same and being fully advised in the premises, makes the following findings of fact, conclusions of law and entry of judgment:

A. FINDINGS OF FACT:

1. This is an original habeas corpus action brought under Title 28 U.S.C. §2254 et seq. by the petitioner to

vacate and set aside a state conviction and sentence of five years imprisonment imposed upon him by the District Court of Tulsa County, Oklahoma in Case Number CRF 71-27, for the offense of Second Degree Burglary.

2. The petitioner is a member of the male sex, and was born on December 9, 1953. Therefore, the petitioner was 17 years of age on January 4, 1971, the date upon which he is alleged to have committed the offense in question and was 17 years of age during all stages of the state court prosecution. In 1971 in Oklahoma, there existed a discrimination between males and females in the 16 to 18 year old category in that males were considered accountable as adults for the purposes of criminal prosecution at age 16, whereas females continued to enjoy the benefits and leniency of Oklahoma's juvenile code until their attainment of the age of 18. Title 10 O.S. 1970 Supp., §1101 (a).

3. The petitioner pleaded guilty to the charge in question on March 11, 1971. However, under the provisions of the "deferred sentence" procedure then obtainin Oklahoma, Title 22 O.S. §991 (a), the Tulsa County District Court declined to formally impose sentence at that time, but instead "deferred" the imposition of sentence for a two-year period (until March 11, 1973), conditioned upon the petitioner's good behavior and compliance with certain conditions of "probation", and assuming completion of the two years under the deferred sentence scheme petitioner would have been allowed to withdraw the plea and the case would be dismissed. The deferred sentence differed from the suspended sentence, and from actual probation, in that under the deferred sentence the defendant would not actually suffer a conviction.

4. On August 9, 1971 the State of Oklahoma filed an application to accelerate judgment and sentence in the case against the petitioner. Functionally this procedure is equivalent to revocation of a conventional suspended sentence.

5. On August 30, 1971, the Tulsa County District Court ordered the imposition of petitioner's sentence be "accelerated" and thereupon sentenced the petitioner to a term of five years imprisonment.

6. The basis for "accelerating" petitioner's sentence was "refusing to obtain and keep employment", "by violating his curfew as set out in the rules", and "by refusing to obey instruction of his probation officer.". No further elaboration of the cause of petitioner's "acceleration" appears in the record.

7. Petitioner perfected a proper petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals. This was the statutory method of seeking a review from a plea of guilty. That petition raised the issues presented in this action. The petition was denied without opinion on November 1, 1971, in *William Stringfield* v. *The State of Oklahoma*, Okl.Cr., No. A 17042, unreported.

8. Thereafter petitioner pursued a statutory application for post-conviction relief, which was filed in the original Tulsa County District Court action under the Oklahoma Post Conviction Act, Title 22 O.S. §§ 1080 et seq. That action again raised all the issued presented in this action. The application was denied on July 7, 1972.

9. The habeas corpus proceeding was then filed before this Court. At that time petitioner was physically incarcerated in the Oklahoma State Reformatory at Granite, Oklahoma, in the actual custody of John Grider,

Warden. Since the filing of the instant petition the petitioner has been released on parole, and pursuant to Rule 21, Federal Rules of Civil Procedure, Sam Isaacs, Parole Officer, Department of Corrections, State of Oklahoma, should be added as a party respondent.

10. In this action the petitioner has urged two grounds for relief: First, that it was an unconstitutional discrimination, based upon sex, and violative of the Equal Protection Clause of the Fourteenth Amendment, to prosecute and punish 16 to 18 year old males as adults and felons for their offenses when 16 to 18 year old females were being processed only as juveniles and delinquents for their misconduct; that such discrimination was expressly held unconstitutional in the case of *Lamb* v. *Brown* (10th Cir. 1972) 456 F.2d 18 and that *Lamb* v. *Brown* must be viewed as fully retroactive so as to be applicable to petitioner in view of such decisions as *Woodall* v. *Pettibone* (4th Cir., 1972) 456 F.2d 49 and *Robinson* v. *Neil* (1973) ____U.S.____, 93 S.Ct. 876.

Second, the petitioner contends that the State Court's imposition of a *five* year sentence was improper in that the original "deferral" for two years constituted, in substance, a sentence to two years on a probationary status; that even if properly revoked, an increase to five years constitutes a violation of the Double Jeopardy guarantee and Due Process guarantees of the U.S. Constitution. See *North Carolina* v. *Pearce* (1969) 395 U.S. 711. And, in any event the severity of the increase is grossly disproportionate to the assertedly trivial nature of petitioner's probationary wrongdoings. Further petitioner contends that the alleged failure at succeeding in or pursuing economic endeavor cannot be constitutionally utilized as a grounds for revocation or acceleration.

11. The Attorney General of the State of Oklahoma, for the respondent, resists the first ground for relief on the basis that: (1) *Lamb* v. *Brown*, supra., is, by its own terms non-retroactive; and, (2) that in any event, subsequent state decisions have interpreted *Lamb* v. *Brown*, supra., as having *reduced* the age of accountability to the age of 14, citing *Schaffer* v. *Green* (Okl.Cr., 1972) 496 P.2d 375 and *Dixon* v. *State* (Okl.Cr., 1972) 497 P.2d 1110.

The Attorney General defends the second ground for relief on the basis that a "deferral" of a sentence does not constitute a "sentence" or "punishment" for double jeopardy purposes, and that until sentence was formally imposed, the trial court still had full discretion to impose any sentence within the established range of punishment for the offense; and that the probationary violations enumerated in the application to "accelerate" were sufficient to revoke or accelerate the petitioner's probationary or deferred status.

12. These and related matters were discussed at the pre-trial hearing before the Magistrate held herein on January 4, 1973, at which time certain factual and documentary items were offered and/or agreed to. The Magistrate then directed briefs to be submitted on the issues, and also the Attorney General in the Order to respond to the petitioner's Petition for Habeas Corpus, was directed to submit a transcript of the petitioner's accleration proceedings.

13. Briefs were thereafter submitted by both sides but the above mentioned transcript has never been supplied.

B. CONCLUSIONS OF LAW:

1. This Court has jurisdiction and venue over the instant cause. Title 28 U.S.C. §2254 (d) and the requirement of exhaustion of state remedies has been met by the filing of an application for Writ of Certiorari to the Oklahoma Court of Criminal Appeals and by the filing of an application for Post Conviction Relief, both raising the issues herein presented. Jurisdiction is retained notwithstanding the petitioner's release on parole. *Jones* v. *Cunningham* (1962) 371 U.S. 236; *Carafas* v. *LaVallee* (1967) 391 U.S. 3060 [*sic*].

2. The Court finds that Petitioner's conviction and punishment as an adult, for an offense committed when he was but 17 years of age, and at a time when a 17 year old female would only have been processed as a juvenile therefor, was and is in violation of the Equal Protection of the Laws Clause of the Fourteenth Amendment to the United States Constitution. *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18; *Reed* v. *Reed* (1971) 404 U.S. 71; see also *Long* v. *Robinson* (D.C. Md., 1970) 316 F. Supp. 22, aff'd. 436 F.2d 1116 (4th Cir., 1971).

The Court is also persuaded that the *Lamb* v. *Brown* case, supra., must also apply retroactively, despite *dictum* therein to the opposite effect. Not only was the question of retroactivity not before the Tenth Circuit in *Lamb* as an issue but also the question of retroactivity has been resolved favorably to the petitioner in two persuasive and controlling Federal opinions rendered since *Lamb* v. *Brown* was decided.

The first, *Woodall* v. *Pettibone* (4th Cir., 1972) 465 F.2d 49, cert. pend., considered a situation arising in the State of Maryland virtually identical with the factual situation presented by petitioner's case. Under the

Maryland juvenile code, a youngster in Baltimore was deemed criminally accountable as an adult at age 16, but youths elsewhere in Maryland continued to enjoy juvenile status to age 18. In the *Long* v. *Robinson* cases cited above, 316 F. Supp. 22, 436 F.2d 1116, the Fourth Circuit held that discrimination to be unconstitutional as applied to those unfavored youths 16 to 18 years of age charged with adult offenses in Baltimore, and ordered their purported adult convictions vacated. However, the Fourth Circuit declined to pass on the retroactivity of its ruling at that time.

In *Woodall* v. *Pettibone*, supra., the Fourth Circuit squarely faced the retroactivity problem posed by its *Long* v. *Robinson* decision; and, in a carefully researched and well reasoned opinion held that its decision in *Long* v. *Robinson* would have to apply retroactively. To summarize the *Woodall* opinion, the Fourth Circuit concluded that the rule of prospectivity appeared to apply primarily with new decisions establishing novel rules of procedure; but that the more fundamental or substantive the nature of the new ruling the more the Courts apply the rule retroactively. The Fourth Circuit concluded that the discrimination against the unfavored youngsters to be so basic and severe that it would be a fundamental injustice to deny to them the benefit of the *Long* v. *Robinson* rule.

Thereafter in January of this year the United States Supreme Court clarified the situation regarding whether a new decision would apply prospectively or retroactively. In *Robinson* v. *Neil* (1973) ____U.S.____, 93 S.Ct. ___, Mr. Justice Rehnquist, writing for a unanimous Court, reiterated that the full retroactivity of new decisions based on constitutional considerations is still the "general rule" and he further pointed out that most

of the Supreme Court's new decisions which were restricted to a prospective application fell into the category of evidentiary matters or having to do with new rules of procedure. The Court also emphasized that decisions related to "the integrity of the fact-finding process" are not the *only* ones to enjoy a retroactive application.

3. This Court, applying the rule of *Robinson* v. *Neil*, supra., concludes that the guarantee of Equal Protection of the Laws is significantly and inherently different from procedural guarantees which have been held to have prospective effect only. Had there been in effect in Oklahoma at the time of petitioner's conviction as an adult, a non-discriminatory statute whereby all persons to the age of 18 would have been treated as juveniles, rather than only females being so treated, the result would have been to prevent the adult proceedings from having taken place at all - absent proper certification - and thus the then existing juvenile code in Oklahoma, Title 10 O.S. 1970 Supp. §1101 (a), was not one prescribing procedural rules which govern the conduct of a trial, even though a trial (as an adult) "might have been conducted with a scrupulous regard for all the constitutional procedural rights of the defendant."

4. In consideration of *Robinson* v. *Neil*, supra., and *Woodall* v. *Pettibone*, supra., and in view of the fundamental issues and rights at stake in this case and as decided by *Lamb* v. *Brown*, supra., the Court concludes that *Woodall* and *Robinson* control, and the Court holds *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18 to have retroactive application and hence available to petitioner, and applicable to his instant litigation.

5. Having concluded that *Lamb* v. *Brown*, supra.,

applies to this case the Court finds that the contention of the Attorney General that all convictions are valid if ocurring after the person reaches the age of 14 overlooks the fact that in *Lamb* the petitioner, *Lamb*, had his conviction vacated and set aside. Since the conviction of the petitioner, Stringfield, suffers from the same Constitutional defect as did that of Lamb, and since the Court finds that the decision in *Lamb* is applicable to this cause, the result must be that petitioner Stringfield's conviction is also void.

6. In view of fact that the Court grants to petitioner relief on the basis presented in his first contention, it becomes unnecessary for the Court to pass upon his other contention that his "acceleration", resulting in an increased sentence of from two to five years, is in violation of his consitutional rights.

IT IS, THEREFORE, ORDERED:

1. That Sam Isaacs, Probation and Parole Officer, Department of Corrections, State of Oklahoma, be and he is hereby added as a party respondent.

2. That the petitioner's motion pursuant to §2254, Title 28, U.S.C., is granted.

3. That a copy of this Order be mailed by the Clerk of this Court to the petitioner, together with a copy of the Second Report of the United States Magistrate.

4. That the Clerk of this Court furnish to respondent a copy of this Order, together with a copy of the Second Report of the United States Magistrate, by mailing the same to the Attorney General of the State of Oklahoma, State Capitol, Oklahoma City, Oklahoma.

5. That counsel for petitioner prepare and submit a formal Writ of Habeas Corpus.

Dated this 21st day of June, 1973.

/s/ Allen E. Barrow

CHIEF JUDGE, UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APPENDIX J

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE ATTORNEY GENERAL
HARRISBURG, PA. 17120

Capitol Annex
(717) 787-3167

November 20, 1973

Isaac Pepp, Esquire
Assistant Defender
Defender Association of Phildelphia
1526 Chestnut Street
Philadelphia, Pennsylvania 19102

Retroactivity of Commonwealth
v. Daniels, Sup. Ct., No. 150,
Jan. Term 1968, (7/1/68)

Dear Ike:

Pursuant to your letter of October 5, 1973, I have received the Pennsylvania Supreme Court's opinion in the above case, and I have examined the Attorney General's file in this matter. Although the opinion does not deal with the question of retroactivity, it seems clear to me that it was intended to be fully retroactive, and this office so interpreted the decision.

The *Daniels* case held that "Muncy sentences" were discriminatory and, therefore, illegal *per se*. Clearly, this holding meant that every woman then confined at Muncy had been sentenced illegally and was entitled to be resentenced. Moreover, as I'm sure you realize, a consideration of every relevant factor discussed by the Supreme

Court of the United States in its constitutional retroactivity cases leads to the conclusion that this ruling had to be given full retroactive application.

I hope that this letter will be of some help.

Sincerely,

/s/ Ben

Benjamin Lerner
Deputy Attorney General
Chief, Office of
Criminal Law

Bl:meh
cc: Fred Gilbert, Esq., 1401 National Bank of Tulsa Bldg.
Tulsa, Oklahoma, 74103

APPENDIX K

STATE OF CONNECTICUT

ATTORNEY GENERAL'S OFFICE
30 TRINITY STREET
HARTFORD

February 8, 1974

ROBERT K. KILLIAN
ATTORNEY GENERAL

Frederick Gilbert, Esq.
1401 National Bank of
Tulsa Building
Tulsa, Oklahoma 74103

Dear Mr. Gilbert:

Enclosed herewith please find copies of two letters of advice dated August 5, 1968 and August 6, 1968, to the then Commissioner of Corrections, Ellis C. MacDougal, State of Conneticut, which you have requested.

If I can be of any further assistance, please do not hesitate to contact my office.

Very truly yours,

ROBERT K. KILLIAN
ATTORNEY GENERAL

/s/ Stephen J. O'Neil
Assistant Attorney General

[*COPY*]

August 5, 1968

Hon. Ellis C. MacDougall
Commissioner of Correction
State Capitol
Hartford, Connecticut

Dear Commissioner MacDougall:

As you know from the conferences we have had, a problem has arisen as a result of the Robinson and Liberti decisions concerning the status of a certain class of inmates at the State Farm for Women.

Recently, the United States District Court, (Blumenfeld, J.) granted a petition for writ of habeas corpus ordering that Carrie Robinson, an adult female, be discharged from the custody of the State Farm For Women as promptly as possible consistent with administrative regulations.

Subsequently, Elizabeth Liberti, also an adult female, was granted a writ of habeas corpus in the Superior Court for New London County in a decision which was handed down (Devlin, J.) August 1, 1968.

Mrs. Robinson was convicted of the crimes of breach of peace and resisting arrest on November 18, 1966 and committed to the State Farm For Women under Section 17-360 of the 1965 Supplement to the General Statutes. On November 11, 1967 she was again presented before the Ninth Circuit Court and pleaded guilty to two (2) charges of intoxication and willful destruction of property. The sentences imposed on these two counts were suspended and Mrs. Robinson was returned to the State Farm as a parole violator under the original sentence. The maximum term to which an adult male found guilty of breach of peace may be sentenced is one (1) year and the

maximum term for an adult male found guilty for resisting arrest is six (6) months. See Sections 53-174 and 53-165, respectively.

On May 5, 1967 Elizabeth Liberti, an adult female, pleaded guilty to one count of breach of peace (G.S. Section 53-174) and was sentenced under Section 17-360 to an indefinite term at the Conneticut State Farm For Women.

The sentences for both of the above cases were challenged in court actions; the first before the United States District Court and the latter case being decided by the Superior Court for New London County. In each case the court arrived at the same result on substantially the same reasoning. Both of the above named persons were committed under Section 17-360 which in brief provides that a person sentenced to an indeterminate term may be held for not longer than three (3) years as an inmate of the institution. Inasmuch as adult males could be held no longer than one (1) year for breach of peach and six (6) months for resisting an officer, both courts held that it is constitutionally impermissible for the State to confine adult women for longer terms than adult males when they are convicted of the same substantive offense.

In view of these court decisions it is our opinion that adult females now confined in the State Farm For Women as a result of being committed to indeterminate sentences under Section 17-360 who have been convicted of crimes the penalty for which is less than three (3) years when applied to adult males should be discharged from the State Farm For Women as soon as it is administratively convenient, provided, of course, they have served the maximum term provided by statute for the particular offense for which each has been convicted. This rules applies only to inmates who had attained the

age of twenty-one (21) years or more at the time of conviction and is strictly limited to the situations presented in the Robinson and Liberti cases. If you have any further questions concerning this matter, please contact us immediately.

Very truly yours,

Robert K. Killian
Attorney General

RJC:M
cc:
Janet S. York,
State Farm For Women

By:
Raymond J. Cannon
Assistant Attorney General

Hon. John J. Daly
Chief Judge of Circuit Court

[*COPY*]

August 6, 1968

Honorable Ellis C. MacDougall
Commissioner of Correction
State Capitol
Hartford, Connecticut

Dear Commissioner MacDougall:

As you know, on August 1, 1968 the United States District Court granted the petition for a writ of habeas corpus filed by Ada Sumrell who was an inmate of the State Farm For Women. The court further ordered her discharge as promptly as possible consistent with the administrative regulations of said institution.

Miss Sumrell had been sentenced to an indefinite term at

the State Farm on June 3, 1966 by the Superior Court for Fairfield County. The sentence was based upon her conviction of the crime of breach of the peace which offense is punishable by imprisonment for not more than one (1) year or a fine of not more than $500 or both. See Section 53-174 of the General Statutes. At the time sentence was imposed, Miss Sumrell was a minor under 21 years of age. She was committed to the State Farm under the provisions of Section 17-360 of the General Statutes which provide among other thing that women who are committed to indeterminate terms at said institution may be held for a maximum term of three (3) years.

Under the provisions of Section 17-390 of the General Statutes, minor males under 21 years of age who were convicted in the Superior Court for offenses for which the maximum punishment is a sentence to jail may be retained in the reformatory for not more than two (2) years.

Any offense punishable by not more than one (1) year imprisonment is an offense for which the maximum punishment is a sentence to jail. See Heating Acceptance Corporation vs. Patterson, 152 Conn., 467, 470.

A minor male, therefore, convicted of the offense of breach of the peace by the Superior Court may be committed to the reformatory for a period of not more than two (2) years.

Miss Sumrell challenged the constitutionality of subjecting her to a term of imprisonment in excess of the term for which a minor male, convicted of the same crime, could be held. The court held that, that portion of a sentence imposed on a minor female which exceeds the maximum sentence for which a minor male convicted of the same crime could be held "constitutes the type of arbitrary and invidious discrimination which the equal protection clause of the Fourteenth Amendment of the Federal Constitution is designed to guard against."

The effect of this decision is that inmates of the State Farm who were minors when convicted of offenses which carry terms of imprisonment of not more than one (1) year may not be held at the State Farm for a period in excess of two (2) years. It is our opinion that this result is applicable whether commitment is made by the Superior Court or by the Circuit Court.

You advise us that there are a number of inmates at the State Farm who fall within the decision of the Sumrell case. We, therefore, advise you that any inmate sentenced to said institution for an indefinite term who was a minor when convicted and who was convicted for an offense punishable by imprisonment for not more than one (1) year should be discharged as soon as administratively convenient upon serving a maximum term of two (2) years.

Very truly yours,

Robert K. Killian
Attorney General

By:
Stephen J. O'Neill
Assistant Attorney General

SJO'N:M
cc: Janet S. York, Superintendent
State Farm For Women
Box 456
Niantic, Connecticut

Hon. John J. Daly
Chief Judge of the Circuit Court
1 Grand Street
Hartford, Connecticut

APPENDIX L

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-178979 August 31, 1973

The Honorable
The Secretary of Defense

Dear Mr. Secretary:

This refers to letter dated June 20, 1973, from the Acting Assistant Secretary of Defense (Comptroller) in which decisions are requested on certain questions which have arised as a result of the ruling of the United States Supreme Court in the case of *Frontiero* v. *Richardson*, No. 71-1694, decided May 14, 1973. The questions, together with discussion pertaining thereto, are contained in Department of Defense Military Pay and Allowance Committee Actions 482-486, enclosed with the letter.

Committee Action 482 presents the following questions:

* * *

"3. In the event that it is determined that family separation allowance payments are now payable to female members, are such payments authorized for periods before 14 May 1973 (date of decision)? If so, what retroactive date should be used for processing such claims and should such claims be processed by the Services or the General Accounting office. See Committee Action 484."

* * *

In the *Frontiero* case the Supreme Court held that "by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove dependency of her husband."

* * *

Therefore, since the Supreme Court has ruled that the differential treatment accorded male and female members with regard to dependents violates the Constitution and the Congress has amended section 401 of title 37, deleting the sentence causing the differential treatment, it is required that the regulations relating to the family separation allowances be amended in consonance with the court's ruling and Public Law 93-64. Questions 1 and 2 of Committee Action No. 482 are answered in the affirmative.

With regard to the answer to question 3 of Committee Action No. 482, see the responses to questions 2c and 2d of Committee Action No. 484.

* * *

Committee Action No. 484 presents the following questions:

> "1. Is quarter allowance entitlement by female service members on behalf of civilian spouses, under Supreme Court No. 71-1694, *Frontiero* v. *Richardson* et al, 14 May 1973, for retroactive application, and if so, for what period?

* * *

The Supreme Court's decision in the *Frontiero* case was an original construction of the constitutionality of certain provisions of 37 U.S.C. 401 and 403 by that court.

We find no indication in the court's decision of an intention to limit that decision to a prospective application only. Since the court ruled that inequality of treatment as between male and female members with regard to entitlement and payment of quarters allowances for the sole purpose of achieving administrative convenience, is a violation of the Due Process Clause of the Fifth Amendment to the Constitution, such a ruling must be regarded as effective from the effective date of the statute. Therefore, the Supreme Court's construction of 37 U.S.C. 401 and 403 in the *Frontiero* case must be given retroactive application. Compare 40 Comp. Gen. 14, 17 (1960) and B-165038, August 16, 1973. The first part of question 1 is answered in the affirmative.

Claims arising as a result of the *Frontiero* decision are subject to the ten-year limitation provided in the barring act of October 9, 1940, 54 Stat. 1061, 31 U.S.C. 71a, which provided in pertinent part as follows:

> "1. Every claim or demand *** against the United States cognizable by the General Accounting Office *** shall be forever barred unless such claim *** shall be received in said office within ten full years after the date such claim first accrued: *Provided,* That when a claim of any person serving in the military or naval forces of the United States accrues in time of war, or when war intervenes within five years after its accrual, such claim may be presented within five years after peace is established."

Therefore, claims which accrued prior to the ten-year period and not received in this Office within the period specified by that act would be barred from consideration. The second part of question 1 is answered accordingly.

* * *

As is pointed out in the Committee Action discussion, the issue in the *Frontiero* case was the right of a female member to receive allowances and benefits on behalf of a civilian husband, however, the rationale and language of the decision connote an intent by the court that the decision should be broadly applied. This view is further supported by other recent decisions of the Supreme Court, cited in the *Frontiero* case, striking sown as unconstitutional statutory schemes which discriminate on the basis of sex. See *Stanley* v. *Illinois*, 405 U.S. 645 (1972) and *Reed* v. *Reed*, 404 U.S. 71 (1971).

* * *

In view of our answers to the questions presented in Committee Action No. 484, question 2 of Committee Action No. 486 is answered by saying that such allowances may be paid retroactively by the service concerned, subject, however, to the provisions of the barring act of October 9, 1940, *supra*. Doubtful claims or claims upon which the period prescribed in the barring act is about to expire should be transmitted to this Office as indicated.

Sincerely yours,

/s/ Paul G. Dembling

For the Comptroller General
of the United States

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-178979 February 1, 1974

The Honorable
The Secretary of Defense

Dear Mr. Secretary:

Further references is made to a letter dated October 11, 1973, with enclosures, from the Assistant Secretary of Defense (Comptroller), requesting an advance decision regarding the entitlement of a female member of the uniformed services to a basic allowance for quarters under the provisions of 37 U.S.C. 403 in the described circumstances. The question is set forth and discussed in Department of Defense Military Pay and Allowance Committee Action No. 496, attached to the letter.

The question presented is as follows:

"Is a female member entitled to basic allowance for quarters, at the without dependent rate, under the *Frontiero* decision for periods before 13 September 1973, subject to the statute of limitations (31 U.S.C. 71a), when the following conditions existed:

* * *

The Committee Action discussion further notes that, based on answers in our decision B-178979 of August 31, 1973 (53 Comp. Gen.____),-which in part responded to certain questions posed in Committee Action No. 483, particularly question 3a of that Committee Action-that arose from the Supreme Court's ruling in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), the Department of Defense revised its policy relative to assignment of

quarters to married service members, effective September 13, 1973, and extended eligibility for assignment to family quarters, if otherwise appropriate, to either member, as jointly decided by both of them. The revised policy also provides that basic allowance for quarters is payable to a female member when she is authorized to reside off station with her husband, notwithstanding the availability of single-type quarters for her occupancy.

The discussion goes on to say that the instructions issued by the military services in implementation of the ruling in the *Frontiero* case and our decision of August 31, 1973, authorize payments to qualified female members on and after September 13, 1973, the effective date of the revised policy referred to above. The Committee Action expresses doubt, however, as to whether DOD Instruction 1338.1, dated January 30, 1964, can legally prohibit payments of basic allowance for quarters to a qualified female member for periods prior to September 13, 1973, and states that a denial of retroactive payments would appear to be in contravention of the law authorizing basic allowances for quarters, as construed by the United States Supreme Court in the *Frontiero* case.

* * *

Neither the Supreme Court nor the Congress had specifically considered the issue of retroactivity. However, in our decision B-178979, August 31, 1973, 53 Comp. Gen.____, we held that the Supreme Court's construction of 37 U.S.C. 401 and 403 must be given retroactive application, stating therein that:

> "We find no indication in the court's decision of an intention to limit that decision to a prospective application only. Since the court ruled that inequality of treatment as between male and female members with regard to entitlement and payment of quarters allowances for the sole purpose of achieving administrative convenience, is

a violation of the Due Process Clause of the Fithe Amendment to the Consitiution, such a ruling must be regarded as effective from the effective date of the statute."

In line with the above-quoted part of our decision of August 31, 1973, it is our view that the Department of Defense may not deny retroactive payments of basic allowance for quarters for periods which antedate September 13, 1973, to a current or former female member of the uniformed services otherwise entitled to these payments.

Retroactive entitlement to such payments is subject, however, to the 10-year limitation provided in the barring act of October 9, 1940, ch. 788, 54 Stat. 1061, 31 U.S.C. 71a, which provides in pertinent part as follows:

* * *

Accordingly, your question is answered in the affirmative, subject to the conditions herein stated.

Sincerely yours,

R. F. KELLER

Deputy Comptroller General
of the United States

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In the
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73-1655

MYER AARON RUHM,
Petitioner,

VERSUS

BOB TURNER, Sheriff, Oklahoma County, Oklahoma,
and
HON. HEZ J. BUSSEY, Judge, HON. TOM BRETT, Judge,
and
HON. ROBERT D. SIMMS, formerly Judge, Court of Criminal Appeals, State of Oklahoma,
Respondents.

BRIEF OPPOSING CERTIORARI

STATEMENT OF CASE

The petitioner, Myer Aaron Ruhm, hereinafter referred to as the petitioner, was charged, tried, and convicted of the crime of Possession of Marihuana (63 O.S. 1961, §§451, 452) in the District Court of Oklahoma County, State of Oklahoma, Case No. CRF-70-2230, and on November 17, 1970, was sentenced to seven (7) years imprisonment and fined Two Thousand Five Hundred Dollars ($2,500). The petitioner then perfected his appeal to the Oklahoma Court of Criminal Appeals which, on April 11, 1972, affirmed the

petitioner's conviction (Appeal No. A-16390). On May 1, 1972, the Court of Criminal Appeals revoked the petitioner's bond.

Thereafter the petitioner filed a petition designated as a Petition for a Writ of Habeas Corpus and/or a Civil Rights Action in the United States District Court for the Western District of Oklahoma (Case No. CIV-72-420). On January 23, 1973, the District Court denied the Petition for a Writ of Habeas Corpus.

An appeal was then taken to the United States Court of Appeals for the Tenth Circuit (No. 73-1259). On February 4, 1974, the Court of Appeals dismissed the case on the grounds that it would entertain the matter as a habeas corpus proceeding, and in view of petitioner's absence from physical custody it would reopen the matter only if the petitioner surrendered himself within thirty (30) days.

The petitioner now seeks a writ of certiorari from this Court.

REASONS FOR NOT GRANTING THE WRIT

When a petitioner does not challenge the incidents of custody, but the very fact of custody itself, then the proper remedy is available only in a habeas corpus proceeding, and if the petitioner is not in fact in custody but is a fugitive from justice then he cannot properly seek relief through a habeas corpus proceeding.

ARGUMENTS AND AUTHORITIES

The respondents respectfully submit that this Honorable Court has previously ruled on the issue herein presented and has consistently held that when one is a fugitive from justice he cannot seek relief through a habeas corpus proceeding. In the case of *Camillo Molinara* v. *New Jersey*, 396 U.S. 365, 24 L.Ed. 586, 90 S.Ct. 498, Molinara was free on bail, but failed to surrender himself to state authorities, and his bond was revoked. In the instant case petitioner's bond was also revoked and he has not surrendered himself to state authorities; consequently the respondents consider the petitioner a fugitive from justice. In *Molinara, supra*, the Court held:

> "No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed on him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claim."

The same decisions were also reached by this Honorable Court in *Bonahan* v. *Nebraska*, 125 U.S. 692, 31 L.Ed. 854, 8 S.Ct. 1390; *Smith* v. *U. S.*, 94 U.S. 97, 24 L.Ed. 32, and *U. S.* v. *Campos-Serrano*, 404 U.S. 294. The Court of Appeals for the Tenth Circuit based its decision on the case of *U. S.* v. *Neal*, 453 F.2d 344 (10th Cir. 1972), which relied heavily on *Molinara, supra*.

For the reason that this issue, as indicated above, has already been decided by this Honorable Court the respondent respectfully submits that this writ be denied.

The remaining question to be considered is whether the relief sought by the petitioner is in the nature of a habeas corpus proceeding, thereby requiring the petitioner be in custody before review of his case may properly be entertained, or it involves a Civil Rights Action.

The respondents respectfully submit that the issue of whether or not an action properly lies in a habeas corpus proceeding or a Civil Rights Action has already been discussed by this Court in the case of *Preiser* v. *Rodriguez*, 411 U.S. 475, 36 L.Ed.2d 439, 93 S.Ct. 827, in which the Court clearly delineated the differences between the two actions. In *Preiser, supra*, this Court indicated that a writ of habeas corpus has been traditionally sought in cases where the petitioner alleges that he is being unlawfully subjected to physical restraint, and that a civil rights action is a proper remedy when a state prisoner is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody.

In the instant case petitioner is not attacking the incidents of custody, but custody itself, even though he is in fact a fugitive from justice and not subjected to any custodial restraint by state authorities. The petitioner simultaneously seeks the relief available to one who has the status of an individual under legal restraint, but at the same time he refuses to surrender himself to state authorities and actually assume the status required to render habeas corpus a proper remedy for him to pursue. The pe-

titioner in essence is attacking the very fact of conviction which resulted in the sentence of physical confinement although he is not physically confined. In *Preiser, supra,* this Court stated:

> ". . . We hold today that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate or speedier release from that imprisonment, his sole Federal remedy is the writ of habeas corpus . . ."

Both the Ninth Circuit and the Fifth Circuit Courts of Appeals have adhered to the guidelines set forth in *Preiser, supra.* In the case of *Padilla* v. *Ackerman,* 460 F.2d 477 (9th Cir. 1972), the Ninth Circuit Court of Appeals held that a "purported civil rights complaint which in essence seeks habeas corpus relief should be treated as an application for a writ of habeas corpus." In the case of *Mason* v. *Askew,* 484 F.2d 642 (5th Cir. 1973), the Fifth Circuit Court of Appeals held that "since appellant challenges not the condition of this confinement, but the fact of imprisonment itself, the United States District Court correctly held that 42 U.S.C. §1983 could not provide the requested remedy in that appellant's Federal relief would have to come in habeas corpus."

The respondents respectfully submit that the relief sought by the petitioner can only be attained through a habeas corpus proceeding, and since the petitioner remains a fugitive from justice he does not have the requisite standing to envoke this Court's jurisdiction in a habeas corpus proceeding.

CONCLUSION

THEREFORE, premises considered, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LARRY DERRYBERRY
Attorney General of Oklahoma
112 State Capitol Building
Oklahoma City, Oklahoma 73105

MARVIN C. EMERSON
First Assistant Attorney General
112 State Capitol Building
Oklahoma City, Oklahoma 73105

Counsel for Respondent

of Counsel:

AMALIJA J. HODGINS
Assistant Attorney General
112 State Capitol Building
Oklahoma City, Oklahoma 73105

July, 1974

CERTIFICATE OF SERVICE

This is to certify that I mailed three copies of the above and foregoing instrument to which this certification is attached, to the following named counsel of record this ..... day of ....., 1974:

Fred P. Gilbert
1401 National Bank of Tulsa Building
Tulsa, Oklahoma 74103
Attorney for Petitioner

.....

MARVIN C. EMERSON

LIBRARY
SUPREME COURT, U. S.

FILED
SEP 28 1974

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1655

MYER AARON RUHM,
Petitioner,

vs.

BOB TURNER, Sheriff,
Oklahoma County, Oklahoma,

and

Hon. HEZ J. BUSSEY, Judge,
Hon. TOM BRETT, Judge,
and
Hon. ROBERT D. SIMMS, formerly Judge,
Court of Criminal Appeals, State of Oklahoma,

Respondents.

MOTION TO VACATE AND REMAND

FREDERICK P. GILBERT
1401 National Bank of Tulsa Building
Tulsa, Oklahoma 74103

Attorney for Petitioner

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1655

MYER AARON RUHM,
Petitioner,

vs.

BOB TURNER, Sheriff,
Oklahoma County, Oklahoma,

and

Hon. HEZ J. BUSSEY, Judge,
Hon. TOM BRETT, Judge,
and
Hon. ROBERT D. SIMMS, formerly Judge,
Court of Criminal Appeals, State of Oklahoma,

Respondents.

MOTION TO VACATE AND REMAND

Comes now Petitioner, MYER AARON RUHM, and respectfully moves that the Judgment of the United States Court of Appeals for the Tenth Circuit herein be vacated and the Cause be remanded to the said Court of

Appeals for further consideration in the light of the Tenth Circuit's own subsequent decision(s) of *Terry Lee Radcliff* v. *Anderson, Warden*, No. 73-1520, and *Grider, Warden* v. *William Lynn Stringfield*, No. 73-1550 (consolidated), June 14, 1974.[1]

In support of his instant Motion, the Petitioner would respectfully allege as follows:

1. The primary substantive argument raised by Petitioner is that the decision of *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, should be accorded retroactive effect, at least to those litigants, like Petitioner, whose convictions were still non-final in the State courts at the time of the promulgation of the *Lamb* decision, supra.

2. In the recent *Radcliff and Stringfield*, supra, the Tenth Circuit has held *Lamb* fully retroactive.

3. The recent *Radcliff and Stringfield a fortiori* voids (or at least arguably voids) Petitioner's conviction herein challenged.

WHEREFORE, premises considered, Petitioner urges that this case may now be more expeditiously processed at the Court of Appeals level; and that in the interests of judicial economy and the orderly administration of justice, the previous decision of the Court of Appeals herein should be vacated and remanded to the

[1]Petition for rehearing en banc pending.

said Court of Appeals for further consideration in the light of the Tenth Circuit's own recent decision(s).

Respectfully submitted,

FREDERICK P. GILBERT
1401 National Bank of Tulsa Building
Tulsa, Oklahoma 74103
Attorney for Petitioner

MEMORANDUM OF LAW

A. Substantive Summary

The law by which Petitioner was convicted as an adult and a felon (as opposed to a juvenile and a delinquent) was the now-defunct 10 Okla.Stat. 1971, Sec. 1101(a), which protected female offenders with juvenile status (as mere delinquents) until age 18, but which relegated male offenders (for the same violations) to the retributive harshness of the adult criminal code of the State of Oklahoma (as felons) at age 16. In other words, amongst the class composed of children 16 and 17 years of age committing the same violations, Oklahoma

discriminated — and discriminated *severely* — in the administration of its substantive criminal justice on the archaic basis of the penally irrelevant and constitutionally impermissible criterion of the youthful offender's biological sex. Since the male Petitioner was only 17 when convicted (as an adult and a felon) for the offense of Possession of Marijuana, whereas a similarly (or even worse) offending like-aged female would at most have been adjudicated a juvenile delinquent, this Petitioner is therefore attacking his purported adult, felony conviction primarily on the obvious basis of Fourteenth Amendment (Sexual) Equal Protection.

This vicious sexual discrimination that has victimized this teenaged male Petitioner has long since been held unconstitutional as violative of Equal Protection. *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18. Compare the virtually identical *Long* v. *Robinson* (D.Md., 1970) 316 F.Supp. 22, aff'd 436 F.2d 1116 (4th Cir., 1971). And, since Petitioner's direct appeal to the Court of Criminal Appeals of the State of Oklahoma was still pending when *Lamb* v. *Brown*, supra, was announced, he naturally sought relief under its provisions; which, however, the State Court denied on the grounds that *Lamb* was nonretroactive. *Ruhm* v. *State* (Okla.Cr., 1972) 496 P.2d 809, at 815.

An action in Federal District Court was likewise unsuccessful, and on the same grounds. *Ruhm* v. *Turner, et al.* (W.D.Okla., 1973) 357 F.Supp. 324. Thereafter, an appeal to the Court of Appeals for the Tenth Circuit was also unsuccessful (although on the basis of what Petitioner submits were wholly irrelevant and insubstantial procedural grounds). *Ruhm* v. *Turner, et al,* 10th Cir., No. 73-1259, February 4, 1974 (unreported).[2]

However, on June 14, 1974, the Court of Appeals for the Tenth Circuit, itself, in its consolidated decision(s) of *Terry Lee Radcliff* v. *Anderson, Warden,* and *Grider, Warden* v. *William Lynn Stringfield,* Nos. 73-1520 and 73-1550, reproduced at Appendix A hereto, held *Lamb* v. *Brown,* supra, to be fully retroactive, and in the process expressly repudiated the remarks in the original *Lamb* opinion suggesting a non-retroactivity thereof (456 F.2d at 20) as mere *obiter dictum* (see page pp. A7-A8 to Appendix A hereto).

Thus, and although the inevitable petition for rehearing en banc is pending (see Appendix B hereto), it appears that the Tenth Circuit is now persuaded of the validity of *Woodall* v. *Pettibone* (4th Cir., 1972) 465 F.2d 49, *cert. den.* 413 U.S. 922 (which held fully retroactive the virtually identical *Long* v. *Robinson* decision(s), supra, 316 F.Supp. 22, 436 F.2d 1116), and convinced of

[2]This and the previous cited opinions affecting Petitioner are fully reproduced in the Appendix to his Petition for a Writ of Certiorari herein.

the applicability of *Robinson* v. *Neil* (1973) 409 U.S. 505, and similar cases. And, with the retroactive rise in the Oklahoma age of juvenility to 18 which has been brought about by the retroactive interpretation of *Lamb* v. *Brown*, this Petitioner's purported adult conviction is now, at last, exposed as not only 'merely' *erroneous*, but indeed, as an absolute *jurisdictional* nullity, see *Ex Parte Powell* (1912) 6 Okla.Cr. 495, 120 Pac. 1022, *Ex Parte Parnell* (1921) 19 Okla.Cr. 273, 200 Pac. 456, *Ex Parte Brown* (1929) 43 Okla.Cr. 339, 278 Pac. 671, and similar cases.

B. Procedure

At the time Petitioner filed his instant Petition for a Writ of Certiorari herein (on May 6, 1974), the prevailing sentiment within the Tenth Circuit appeared to be to the effect that *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, was non-retroactive. See id., 456 F.2d at 20, and this Petitioner's own unsuccessful attempts to convince any Court of the contrary. Petitioner therefore had no recourse but to seek relief before the Supreme Court of the United States.

Since the filing of the Petition herein, however, the Tenth Circuit has either changed or clarified its outlook, and now holds *Lamb* v. *Brown*, supra, fully retroactive. *Terry Lee Radcliff* v. *Anderson, Warden*, and *Grider, Warden* v. *William Lynn Stringfield*, Nos. 73-1520 and

73-1550 (consolidated), June 14, 1974, Appendix A hereto.[3] Since this Petitioner's conviction was still non-final (as pending on direct appeal to the Oklahoma Court of Criminal Appeals) on the date of the *Lamb* v. *Brown* decision, then *a fortiori* this Petitioner is entitled to relief under *Lamb* by virtue of the recent *Radcliff and Stringfield*, supra, see *Linkletter* v. *Walker* (1965) 381 U.S. 618, 625-627.

And, since the retroactive increase in the age of male juvenility from 16 to 18 brought about by *Radcliff and Stringfield* has in effect rendered this Petitioner's purported adult conviction a *jurisdictional* nullity,[4] it is extremely doubtful that the Court of Appeals, if presented again with Petitioner's case, would now let mere procedure stand in the way of adjudicated substantive law and constitutional justice.

Since it would appear that relief is now fully available at the Circuit level, there scarcely remains much reason to consume the Supreme Court's time and attentions with Petitioner's case - but for, of course, the fact that Petitioner was denied relief below before the promulgation of the Circuit's recent retroactivity ruling.

[3]Petition for rehearing en banc pending, see Appendix B.

[4]See *Ex Parte Powell* (1912) 6 Okla.Cr. 495, 120 Pac. 1022, *Ex Parte Parnell* (1921) 19 Okla.Cr. 273, 200 Pac. 456, and *Ex Parte Brown* (1929) 43 Okla.Cr. 339, 278 Pac. 671, and similar cases.

In such cases, therefore, the proper procedure for the Supreme Court is to "vacate and remand to the _____ Court of _____ for further consideration in the light of [some recent decision]."

Normally, of course, the "recent decision" is a recent *Supreme* Court decision. However, precedent does exist for the "vacate and remand" procedure when the recent decision is by a lower court, whether a Court of Appeals, see *U.S. ex rel. Robinson* v. *Johnston* (1942) 316 U.S. 649, or even on occasion by a State court, see *Rivas* v. *Cozens* (1972) 409 U.S. 55.

Therefore, and given the recent developments and present posture of this case, the Petitioner would submit that the proper procedure herein, and the one most expeditious of economizing available judicial manpower while yet preserving the substantial rights of the instant Parties involved, would be for this Honorable Court to vacate the action of the Court of Appeals, and to remand the cause herein for further consideration in the light of the Tenth Circuit's own recent decision(s) in *Radcliff and Stringfield*, supra.

Respectfully submitted,

FREDERICK P. GILBERT
1401 National Bank of Tulsa Building
Tulsa, Oklahoma 74103

Attorney for Petitioner

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED

JUN 14, 1974

HOWARD K. PHILLIPS
CLERK, UNITED STATES
COURT OF APPEALS
TENTH CIRCUIT

MAY TERM, 1974

TERRY LEE RADCLIFF Petitioner-Appellant, v. PARK ANDERSON, WARDEN, Respondent-Appellee.	)	No. 73-1520
WILLIAM LYNN STRINGFIELD, Petitioner-Appellee, v. JOHN GRIDER, WARDEN, OKLAHOMA STATE REFORMATORY, SAM ISAACS, PROBATION AND PAROLE OFFICER, DEPARTMENT OF CORRECTIONS, STATE OF OKLAHOMA, Respondents-Appellants.	)	No. 73-1550

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 73-C-81 and No. 72-C-236)

Fred P. Gilbert (Andrew T. Dalton, Jr., on the brief) for Appellant Radcliff and Appellee Stringfield.

Kay Karen Kennedy, Assistant Attorney General (Larry Derryberry, Attorney General of Oklahoma, on the briefs), for Appellee Anderson and Appellants Grider, et al.

Before BREITENSTEIN, SETH and DOYLE, Circuit Judges.

BREITENSTEIN, Circuit Judge.

The issue is the retroactivity of *Lamb* v. *Brown*, 10 Cir., 456 F.2d 18, which held that 10 Okl. St. Ann. §1101 (Supp. 1969) was unconstitutional in that it violated the equal protection clause of the Fourteenth Amendment. Section 1101 allowed the benefits of juvenile court proceedings to females under the age of 18 years but limited those benefits to males under the age of 16 years. The opinion concluded with the statement that: "This ruling shall not apply retroactively." Ibid. at 20.

We now have two habeas corpus cases each brought in the Northern District of Oklahoma by a male who was denied juvenile court proceedings because of age. Petitioner-appellant Radcliff, at age 17, was prosecuted as an adult and found guilty of unauthorized use of a motor vehicle. Petitioner-appellee Stringfield, when 17 years old, was prosecuted and sentenced as an adult for second degree burglary. Each claims that §1101 unconstitutionally deprived him of the right of juvenile proceedings and, hence, the adult proceedings cannot be sustained.

No. 73-1520 is an appeal from the denial of the habeas petition of Radcliff. Judge Daugherty construed the *Lamb* decision as deciding that the issue there involved was procedural rather than substantive and held that he was bound to follow the declaration that *Lamb* had no retroactive application. Accordingly, he dismissed the habeas action.

No. 73-1550 is an appeal by the warden of the Oklahoma reformatory from the grant of the habeas petition of Stringfield. Judge Barrow held that the action taken in *Lamb* was substantive and that the declaration of nonretroactivity was dictum, not binding on him. Accordingly, he granted the habeas writ.

The *Lamb* decision is the law of the circuit and we are concerned only with its retroactivity. There are

decisions that an unconstitutional law must be taken as having no effect whatsoever from the very date of its enactment. See *Chicago, Ind. & L. Ry. Co.* v. *Hackett*, 228 U.S. 559, 566; *Norton* v. *Shelby County*, 118 U.S. 425, 442; and *Ex parte Siebold*, 100 U.S. 371, 376. Later cases have rejected this holding. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 374; and *Linkletter* v. *Walker*, 381 U.S. 622-629. Accordingly, retroactivity must be determined in the light of recent decisions of the Supreme Court.

During its last term the Court reviewed the subject in *Robinson* v. *Neil*, 409 U.S. 505, and *Gosa* v. *Mayden*, 413 U.S. 665. The opinions in those cases analyzed and scrutinized the Court's previous decisions on retroactivity. Any attempt on our part to reexplore the field would be nonproductive. It is enough that none of the decisions referred to in *Robinson* and *Gosa* treat the specific issue before us. *Robinson* was concerned with the retroactivity of *Waller* v. *Florida*, 397 U.S. 387, which barred, on double jeopardy grounds, two prosecutions, state and municipal, based on the same act of offense. In holding that *Waller* was fully retroactive, the Court said that the practical result of the constitutional provision against double jeopardy "is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial." 409 U.S. at 509.

Gosa v. *Mayden*, 413 U.S. 665, was concerned with the retroactivity of *O'Callahan* v. *Parker*, 395 U.S. 258, which held that a serviceman charged with a nonservice connected crime was entitled to indictment by grand jury and trial in a civilian court. A plurality of the Supreme Court held that *O'Callahan* should "be accorded prospective application only." 413 U.S. at 685. The Court recognized three dominant considerations applicable to a determination of retroactivity. They were (1) purpose of the new constitutional rule, 413 U.S. at 679, (2) reliance on the old rule, Ibid. at 682, and (3) effect on the administration of justice, Ibid. The Court commented that consideration also must be given to "the impact of a retroactivity holding on the interests of society when the new constitutional standard promulgated does not bring into question the accuracy of prior adjudications of guilt." Ibid. at 685.

The application of the *Gosa* tests to the issue before us produces no ready answer. The purpose of *Lamb* was to end sex discrimination in juvenile proceedings. The reliance on §1101 was confined to the period between January 13, 1969, its effective date (see statement preceding §1101 in 1 O.S. 1971), and the March 16, 1972, decision in *Lamb*. The record contains nothing to show the impact of *Lamb* on the administration of justice, other than the two cases before us and the possibility of others wherein sex discrimination occurred during the

three-year period. The interests of society must be balanced against "essential justice" to the individuals. See *Gosa*, 413 U.S. at 685.

We have here no question of the accuracy of the fact-finding process. We assume that the adult proceedings to which these boys were subjected resulted in the determination of the truth. In any event, the integrity of the fact-finding process is not an absolute criterion. See *Robinson*, 409 U.S. at 508 citing *Furman* v. *Georgia*, 408 U.S. 238. *Robinson* points out that the post-*Linkletter* cases giving prospective application to procedural rules did not involve "the basic fairness of the earlier trial." 409 U.S. at 509.

The Oklahoma statutes give to children benefits not allowable to adults. These include form of petition (§1103), custody (§1104), release to parents (§1107), temporary detention (§1108), conduct of hearings, including a provision for privacy (§1111), and discretionary certification for adult proceedings after a preliminary hearing (§1112(b)).

Mr. Justice Black, concurring in *In Re Gault*, 387 U.S. 1, 59, said that the juvenile laws "provide a system of courts, procedures, and sanctions deemed to be less harmful and more lenient to children than to adults." The petitioners were denied the benefits of the system which Oklahoma provides for children. Accordingly, we are

concerned here with both basic fairness and essential justice.

Woodall v. *Pettibone*, 4 Cir., 465 F.2d 49, dealt with the retroactivity of a federal decision holding unconstitutional upon the ground of denial of equal protection certain Maryland statutes permitting different treatment of juveniles in mentioned geographical areas. The court said that to deny in one area the opportunity to take advantage of diminished responsibility as a juvenile and to allow it in another area "is so fundamentally unfair as to impeach the validity of the 'adult' proceedings and render unreliable the guilty verdicts obtained in those proceedings." 465 F.2d at 52.

A certiorari application in *Woodall* was denied by the Supreme Court, see 413 U.S. 922, on the same day that it decided *Gosa*. Although denial of certiorari has normally no implication or inference, we believe that the denial in *Woodall*, when coupled with the disparity of views expressed in the four opinions filed in *Gosa*, is some indication of the attitude of the Supreme Court towards the problem before us. *Cf. United States* v. *Kras*, 409 U.S. 434, 443.

No question of retroactivity was presented in *Lamb*. The statement that its ruling should not apply retroactively, see 456 F.2d at 20, is dictum which arises no higher than "comment merely *obiter*." *Hawks* v. *Hamill*,

288 U.S. 52, 59. We believe that the principles of "basic fairness" mentioned in *Robinson* and "essential justice" mentioned in *Gosa* require that the *Lamb* decision be applied retroactively.

In 73-1520, Radcliff, the judgment is reversed and the case is remanded to the district court for further proceedings in the light of this opinion.

In 73-1550, Stringfield, the judgment is affirmed.

SETH, Circuit Judge, Dissenting:

I respectfully dissent from the majority opinion. The panel which decided *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir.), stated that the holding therein would be applied prospectively only. This to me is a provision properly part of the opinion to express its application and effect. Such a statement is within the authority of a court in the application of its opinions, and is an expression of court policy on the subject. Thus the matter of whether the issue was raised by the parties is not a consideration. Parties are not expected to raise in the pleadings matters relating to an application of an opinion in the same case.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TERRY LEE RADCLIFF,	)	
	)	
Petitioner-Appellant,	)	
	)	
vs.	)	No. 73-1520
	)	
PARK ANDERSON, Warden, Oklahoma State Penitentiary,	)	
	)	
	)	
Respondent-Appellee.	)	

WILLIAM LYNN STRINGFIELD,	)	
	)	
Petitioner-Appellee,	)	
	)	
vs.	)	No. 73-1550
	)	
JOHN GRIDER, Warden, Oklahoma State Reformatory, SAM ISAACS, Probation and Parole Officer, Department of Corrections, State of Oklahoma,	)	
	)	
	)	
Respondents-Appellants.	)	

[CONSOLIDATED CASES]

JULY TERM - JULY 10, 1974

Before Honorable David T. Lewis, Chief Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. Mc-

Williams, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges

The Court, upon its own motion, and in order to correct clerical error, withdraws the Order regarding the En Banc Hearing which was entered in the consolidated cases above on July 9, 1974, and in substitution therefor, enters the following Order:

Upon the suggestion of the respondent-appellee in No. 73-1520 and of the respondents-appellants in No. 73-1550 and upon a vote of the Judges in regular active service, it is ORDERED:

1. The petition for rehearing of these consolidated cases shall be heard and determined by the Court sitting en banc pursuant to 28 U.S.C. §46(c).

2. The rehearing is limited to the issue of the retroactivity of this Court's decision in *Lamb* v. *Brown*, 456 F.2d 18, that 10 Okl. St. Ann. §1101 (Supp. 1969) is unconstitutional.

3. The parties to these consolidated cases may file such additional or supplemental briefs as they may desire on or before July 29, 1974.

4. The parties to case No. 71-1355, *Lamb v. Brown*, shall be given notice of this Order and may appear and file briefs on or before July 29, 1974.

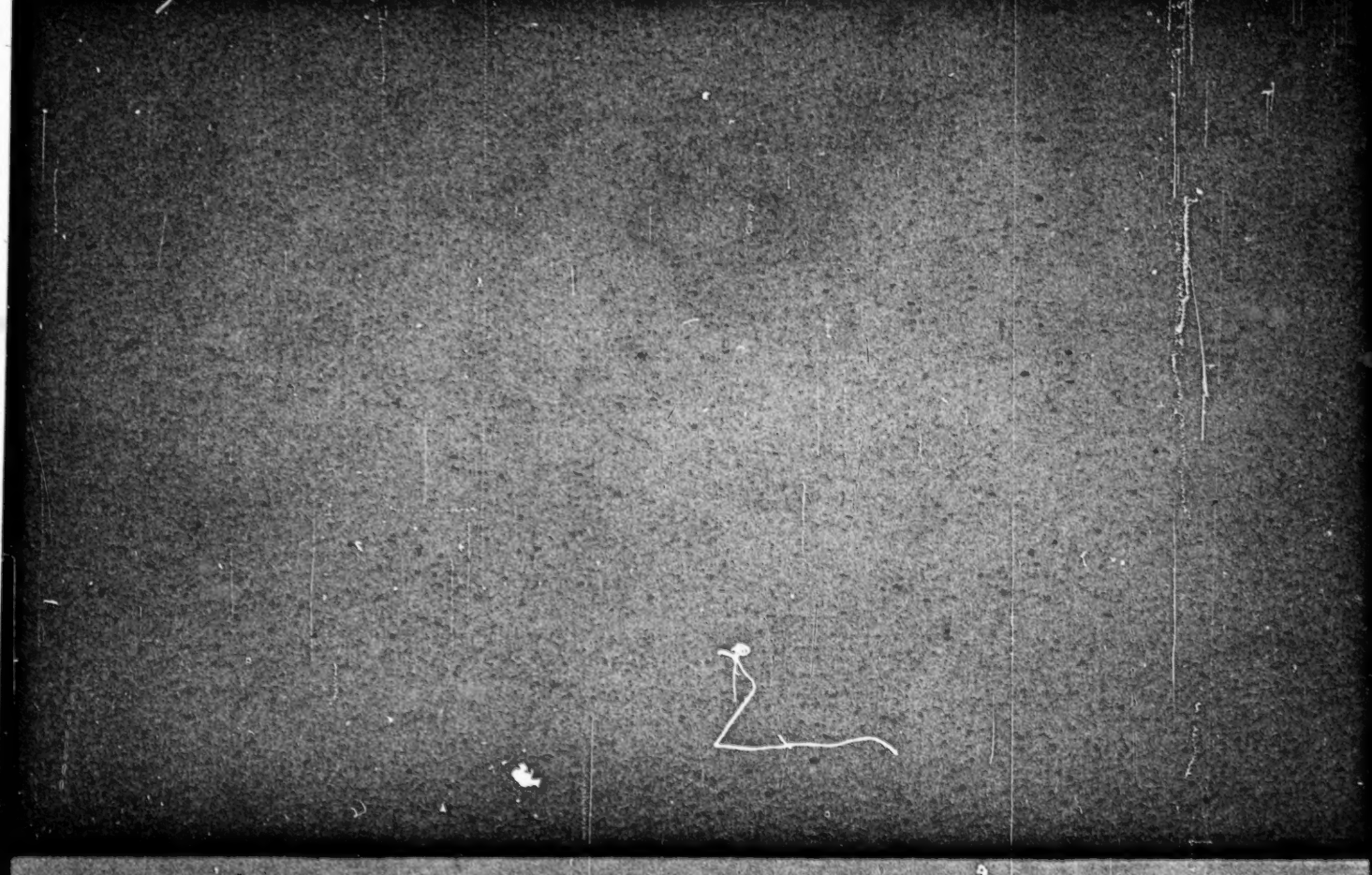
5. No oral argument on the rehearing will be permitted unless the Court so Orders on its own motion.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

A true copy
Teste

Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit

By: /s/ Anne Cabot
Deputy Clerk



SUPREME COURT, U. S.

FILED

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1655

MYER AARON RUHM,
Petitioner,

vs.

BOB TURNER, Sheriff,
Oklahoma County, Oklahoma,

and

Hon. HEZ J. BUSSEY, Judge,
Hon. TOM BRETT, Judge,
and
Hon. ROBERT D. SIMMS, formerly Judge,
Court of Criminal Appeals, State of Oklahoma,
Respondents.

REPLY TO BRIEF OPPOSING CERTIORARI

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Attorney for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

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vs.

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Oklahoma County, Oklahoma,

and

Hon. HEZ J. BUSSEY, Judge,
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Hon. ROBERT D. SIMMS, formerly Judge,
Court of Criminal Appeals, State of Oklahoma,
Respondents.

REPLY TO BRIEF OPPOSING CERTIORARI

REPLY TO BRIEF OPPOSING CERTIORARI

Comes now Petitioner, MYER AARON RUHM, and for his Reply to the Respondents' Brief Opposing Certiorari, would respectfully submit the following considerations:

First of all, the Petitioner would dispute the State's factual "Reasons for not Granting the Writ," as advanced on pages 2 and 4 of the Respondents' said Brief to the effect that the Petitioner is not attacking "the incidents of custody, but the very fact of custody itself." Nothing could be further from the truth; for indeed, as the Respondents themselves dwell upon at length, the Petitioner is *not* in physical custody; so clearly, by the Respondents' own contentions, the "very fact of custody" is obviously *not* being challenged.

Rather, as set forth in the original Complaint before the District Court, and as alluded to at pp. 5-6, 10, 19 of the Petition herein, the Petitioner was not so much seeking a formal writ of habeas corpus as he was seeking, e.g., a restoration of his voting rights (on Nineteenth Amendment grounds), and the lifting of his sexually-

grounded exclusion from 30-some-odd occupations, pursuant to Title VII of the Civil Rights Act of 1964,[1] prayers which clearly are more "civil rights" than "habeas corpus" in nature. Even that portion of his Complaint that attacked his conviction directly was as much for a *declaratory judgment* of the invalidity thereof, 28 U.S.C. 2201 et seq, coupled with the "civil-rights" remedy of the expungement of the records thereof.

At any rate, the District Court, without substantial objection, *did* entertain the action as "civil rights," *Ruhm* v. *Turner, et al.*, (W.D.Okla., 1973) 357 F.Supp. 324, fn. 1 at 325; and during the course of that action had

[1]Since a marijuana-possessing boy of 17 was an "adult felon" in Oklahoma at the time of Petitioner's conviction therefor in 1970 by virtue of 63 O.S. 1961, 451-452, and 10 O.S. 1970 Supp., 1101(a), whereas a similarly-offending like-aged girl was only a "juvenile deliquent," the boy, as the "felon," lost his franchise, Okla.Const., Art. III, Sec. 1, whereas the "deliquent" girl did not, 10 O.S. 1971, 1127(b).

Likewise, the boy, branded a "felon" because of his sex, was (and still is) barred for life from the occupations (in Interstate Commerce) of medicine (59 O.S. 509(6)), dentistry (59 O.S. 328.32(a)), law (Bar Rule X(4)(b), 5 O.S. Ch. 1, App. 1), pharmacy (59 O.S. 353.26(c), psychology (59 O.S. 1370(a)(1)), physical therapy (59 O.S. 887.13(c)), social work (59 O.S. 1266(2)), chiropractry (59 O.S. 164d(b)), electrology (59 O.S. 805), cosmetology (59 O.S. 199.11(a)), undertaking (59 O.S. 396.12(a)), bartending (37 O.S. 527(a)(3)), realty (59 O.S. 850(o), shorthand reporting (20 O.S. 1502(d)(1), bonding (59 O.S. 1310(5)), accounting (59 O.S. 15.20(d)), engineering (59 O.S. 475.18(c)), architecture (59 O.S. 45.14(a), and surveying (59 O.S. 475.32), plus serving as a director of a bank (6 O.S. 1407) or other corporation (18 O.S. 1.40) or as an executor or administrator of an estate (58 O.S. 102(2)), as well as from certain areas of public employment, such as jury duty (38 O.S. 28(7)), elective office (26 O.S. 162) or other State employment (51 O.S. 24.1), or anything requiring the bearing of arms (21 O.S. 1283), including enlistment in the Armed Forces, see Army Regulation No. 601-210 — *all of which disqualifications in the area of employment the similarly [or even worse] offending girl does* **not** *suffer, by virtue of her mere "adjudication" of "deliquency,"* 10 O.S. 1127(b)!

specifically ruled that the Petitioner's (or Plaintiff's) apparent absence from custody was *not* a jurisdictional (or other) bar to adjudicating the merits of the action (as evidenced by the fact that the District Court decision, while adverse, was indeed squarely on the merits). See Appendix A hereto.

It is interesting to note that the State did *not* file a cross-appeal to the District Court's orders on the "civil rights" vs. "habeas corpus" and the "in custody" issues; which, Petitioner submits, raises a grave issue regarding the propriety of the Court of Appeals' unilateral and unsought decision to entertain the action *solely* as habeas corpus, thereby *changing* it from civil rights. Certainly the Petitioner feels it was unfair for the District Court, with full knowledge of the Petitioner's absence, first to assure the Petitioner that his presence was *not* necessary, and thus to promulgate an adverse decision on the merits - and then for the Court of Appeals to render the adverse decision on the merits unreviewable solely because of purely procedural difficulty that had openly existed from the inception of this litigation, and which, as stated, Petitioner had been assured would *not* constitute a jurisdictional defect. In other words, if Petitioner's apparent absence was a bar to the consideration of his Complaint on the merits, the fact should have been proclaimed at the outset, before an adverse adjudication on the merits had been entered - and not

sprung against him by surprise for the first time on appeal, so as to render the adverse decision on the merits procedurally unreviewable.

The Petitioner has already submitted his contention that *Preiser* v. *Rodriquez* (1973) 411 U.S. 475, is directed against the use of 42 U.S.C. 1983 as an evasion of the *exhaustion* prerequisites of habeas corpus, 28 U.S.C. 2254(b) - a point not involved in this case since there *was* exhaustion of State remedies, *Ruhm* v. *State* (Okla.Cr., 1972) 496 P.2d 809. See Petition herein, pp. 5-6, 19. Moreover, the traditional "custody" requirement of habeas corpus is simply no longer extant, *Hensley* v. *Municipal Court* (1973) 411 U.S. 345, and similar cases.

Since the exhaustion requirement *has* been met in this case, the rule of *Preiser* v. *Rodriquez*, supra, should not constitute a bar to proceeding under 42 U.S.C. 1983 and 28 U.S.C. 2201, if that would otherwise be the more appropriate course: which it obviously is, since the object of the declaratory judgment procedure is, inter alia, to insure against *prospective* harm to commence *in futuro* (e.g., the incarceration threatened herein), whereas habeas corpus traditionally is a procedure to relieve *accomplished* incarceration and which requires, in the Respondent's viewpoint, though contrary to all logic and justice, the suffering of the very punishment being challenged as a procedural prerequisite to the challenging

of that punishment! Thus, the State's urging of habeas corpus as the sole mechanism for challenging a conviction is akin to the ancient prosecutorial resistance to the civil rights declaratory judgment procedure of challenging an unconstitutional statute (as opposed to first violating the law, and then raising the unconstitutionality thereof as a defense to a subsequent criminal prosecution therefor).

Somewhere in our Anglo-American system of justice there surely must be a principle that a person capable of posting bond should not have to spend even one day in prison, until found guilty of some offense and the conviction therefor is *finally* adjudicated as constitutionally valid by a court possessed of competent appellate and/or collateral jurisdiction; and while this principle may be subject to some degree of qualification when the appellate or collateral attack is deemed to be frivolous, that sole exception to the basic principle of no punishment before a valid *final* conviction obviously does not apply in this case, when the Court of Appeals itself, in the recent case(s) of *Terry Lee Radcliff* v. *Anderson, Warden*, and *Grider, Warden* v. *William Lynn Stringfield*, 10th Cir., Nos. 73-1520 and 73-1550 (consolidated), June 14, 1974, has held its previous decision of *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, fully retroactive, accord, *Woodall* v. *Pettibone* (4th Cir., 1972) 465 F.2d 49, cert. den. 413 U.S. 992, and thereby rendered this

Petitioner's similar conviction not only 'merely' erroneous, but an absolute *jurisdictional nullity.*[2]

Finally, and to whatever extent the Petitioner's absence may be deemed to be of any procedural relevance, Petitioner would submit that the State is *in pari delicto* therein by virtue of the fact that the Petitioner's bond was revoked by the State court as a retaliation to his previous attorney's threat to take the sexual discrimination herein to a *Federal* Court! See Appendix B hereto - an action which has been severely censured even within Oklahoma, see Appendix C hereto. And, lest there be any doubt as to the true nature of the State court's reaction to the youths who won *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, supra, attention is invited to the outraged tone of such decisions as *Schaffer* v. *Green* (Okla.Cr., 1972) 496 P.2d 375.

[2]For more details, see Petitioner's "Motion to Vacate and Remand" herein. Stated simply, the combined effect of *Lamb* v. *Brown* and *Radcliff and Stringfield* is to have retroactively raised the male age of juvenility in Oklahoma from 16 to 18 (as it has been for girls). Thus, this male Petitioner's "adult" conviction, imposed at age 17, is a *jurisdictional* nullity under Oklahoma law, such that:

> "It is attended by none of the consequences of a valid adjudication... It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever ... It is not necessary to take any steps to have it reversed, vacated, or set aside, and whenever it is brought up against the party he may assail its pretensions and show its worthlessness. It is supported by no presumptions, and may be impeached in any action, direct or collateral. It is a judgment which is entirely void, and may be shown to be void in a collateral as well as a direct proceeding..."

Ex Parte Parnell (1921) 19 Okla.Cr. 273, 200 Pac. 456, 459-460, and many similar Oklahoma juvenile/criminal cases.

Thus, if this disturbed, teenaged boy be absent from Oklahoma, that absence was more than provoked by the State itself by an action which was unabashedly inflicted as nothing other than an outright penalization for his "daring" to assert the right to seek redress in a Federal forum, and wherefor the success of such provoked absence should not be deemed a proper basis for the denial of relief, if otherwise merited, by the Federal courts.

Respectfully submitted,

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Tulsa, Oklahoma 74103

Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MYER AARON RUHM,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Case No. 72-420 Civil
	)	
BOB TURNER, Sheriff, Oklahoma County, Oklahoma,	)	
	)	
Defendant.	)	

ORDER

The Defendant's Motion To Dismiss based on his assertion that the Plaintiff is not "in custody" is overruled.

The Complaint appears to contain a civil rights action. Custody is not an essential to this type of action. Defendant will answer the Complaint within ten (10) days from the date hereof.

It is so ordered this 21 day of August, 1972.

/s/ Fred Daugherty
Fred Daugherty
United States District Judge

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

No. A-16,390

MYER AARON RUHM,
Plaintiff in Error,

vs.

THE STATE OF OKLAHOMA,
Defendant in Error.

ORDER DENYING BOND

WHEREAS, it is anticipated that an appeal to Federal District Court or the United States Supreme Court may be forthcoming in the above-styled and numbered cause on a jurisdictional question;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that bond, pending any further proceedings in any Court, be, and the same is, hereby DENIED.

WITNESS MY HAND AND SEAL OF THIS COURT this 1st day of May, 1972.

/s/ Hez J. Bussey
Presiding Judge

/s/ Robert D. Simms
Judge

APPENDIX C

[Volume 44, Oklahoma Bar Journal, Page 1879
Issue No. 22, June 2, 1973]

President Pro Tempore, James E. Hamilton, of the Oklahoma State Senate, has requested the publication in The Journal of the following Senate Resolution which passed the Senate:

Resolution

ENROLLED SENATE
RESOLUTION NO. 68

BY: STIPE

A RESOLUTION EXPRESSING THE SENSE OF THE SENATE THAT THE COURT OF CRIMINAL APPEALS' RULE 1.17B IS NOT IN KEEPING WITH THE CONSTITUTIONALLY ASSURED RIGHT TO BAIL.

WHEREAS, the right to bail, except for certain offenses, is assured by Article II, Section 8 and 9 of the Oklahoma Constitution, and by Amendment VIII of the United States Constitution; and

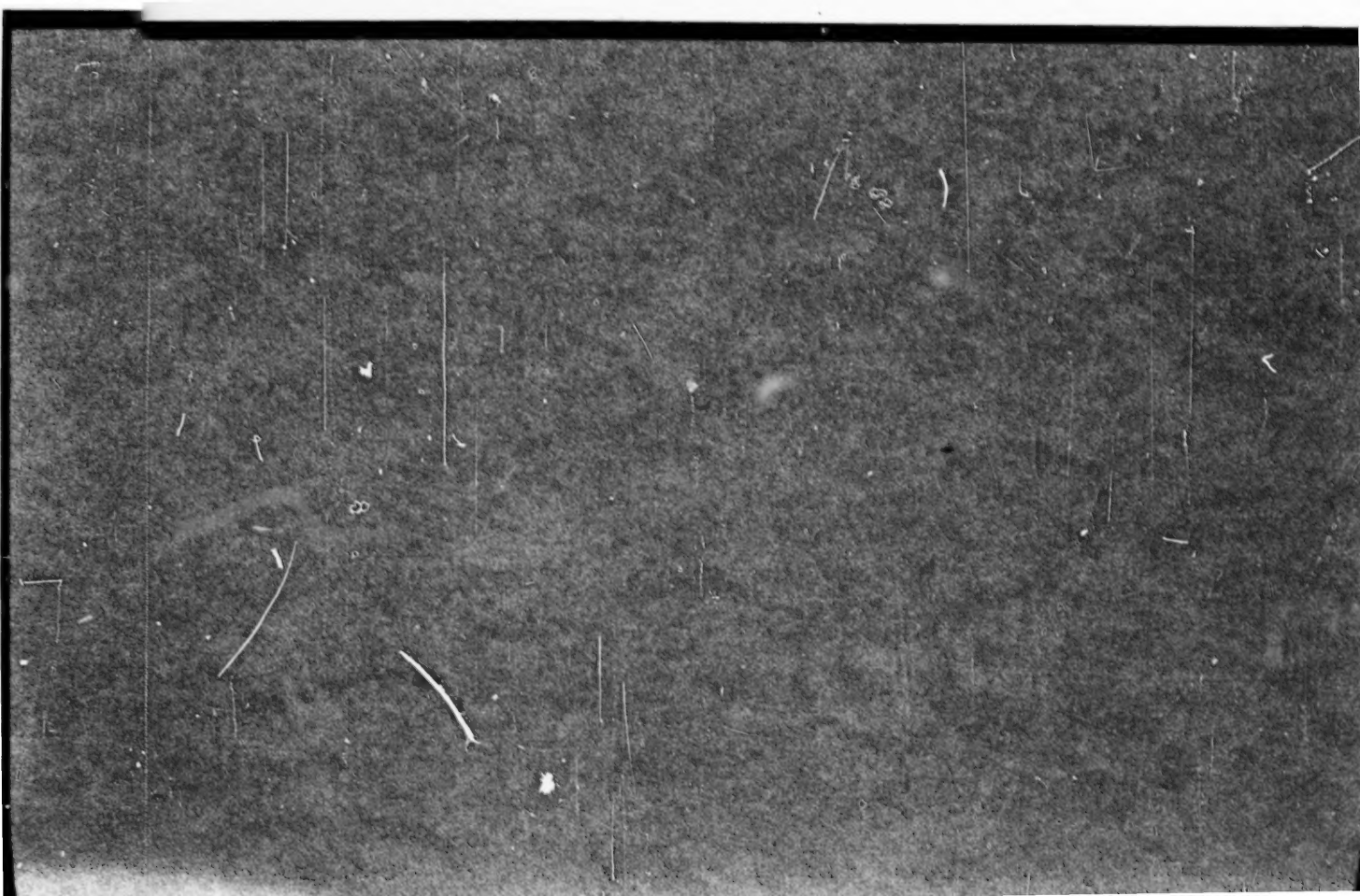
WHEREAS, Rule 1.17B of the Rules of the Court of Criminal Appeals is of provision that when said court has denied a petition for rehearing and, within five days, the mandate has issued "The mandate shall not be recalled, nor stayed, pending an appeal to any other court, nor shall bail be allowed by this court pending an appeal from a final decision of this court."

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE OF THE 1ST SESSION OF THE 34TH OKLAHOMA LEGISLATURE:

THAT it is the sense of the Senate that said provision precluding allowance of bail, above quoted, is not in keeping with rights protected by the United States and Oklahoma Constitutions.

Adopted by the Senate the 17th day of May, 1973.

/s/ LEON FIELD
Acting President of the Senate



FILED

MICHAEL RODAK, JR.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1974 (1973)

No. A-136 [73-1665]

MYER AARON RUBIN,
Petitioner,

vs.

BOB TURNER, Sheriff,
Oklahoma County, Oklahoma,

and

Hon. HEZ. J. BUSBY, Judge,
Hon. TOM BENNETT, Judge,

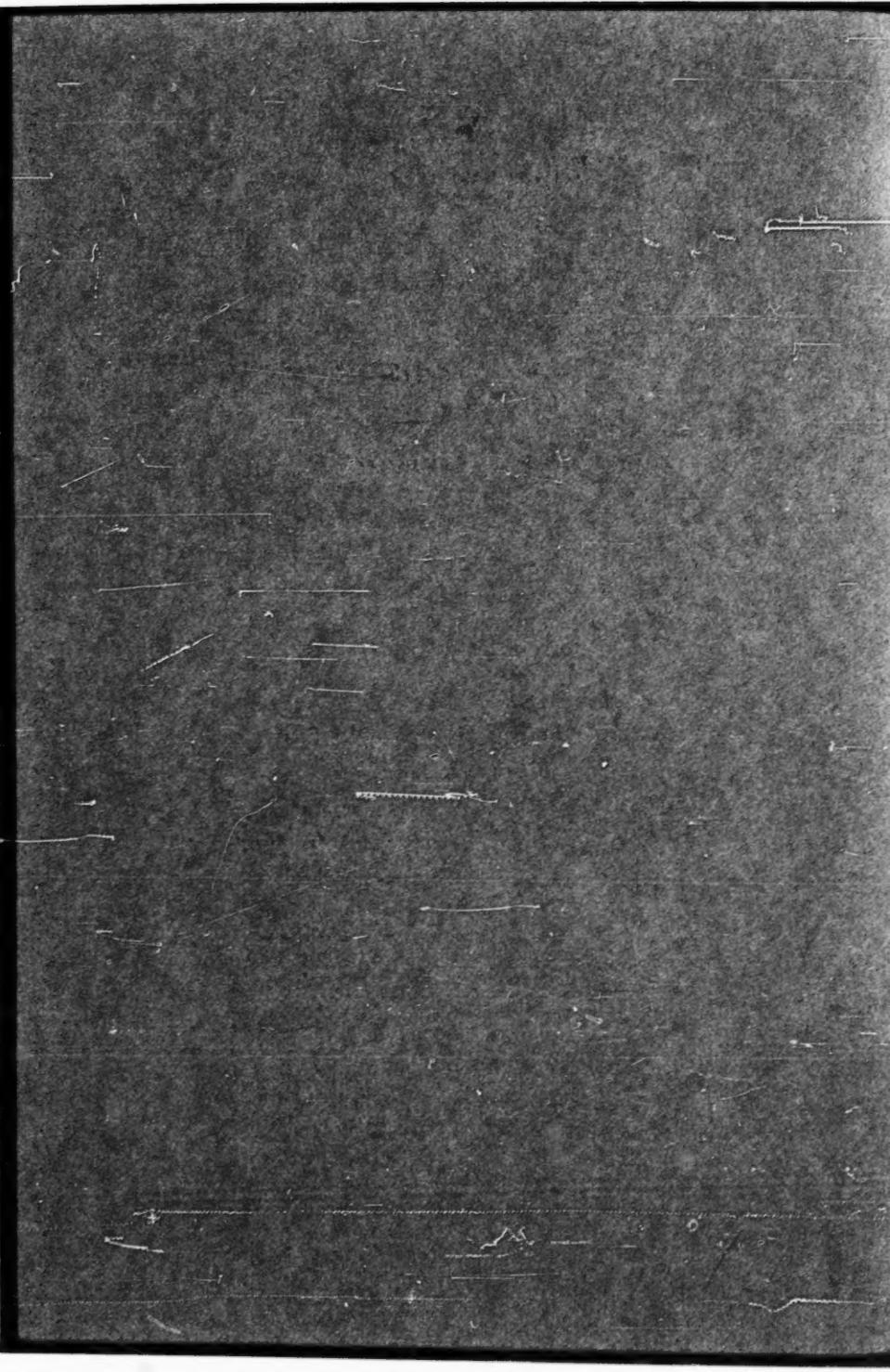
and

Hon. ROBERT D. SIMMS, Assistant Judge,
Court of Criminal Appeals, State of Oklahoma,

Respondents.

PETITION FOR REHEARING

FREDERICK P. GILBERT
1401 National Bank of Tulsa Building
Tulsa, Oklahoma 74103
Attorney for Petitioner



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Terry Lee Radcliff v. Anderson, Warden, and Grider, Warden v. William Lynn Stringfield, 10th Cir., Nos. 73-1520 and 73-1550 (consolidated), June 14, 1974, ____F.2d.____ 2,5,13,15

Robinson v. Neil (1973) 409 U.S. 505 5,12

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Ruhm v. Turner, et al. (W.D.Okla., 1973) 357 F.Supp. 324, 10th Cir., No. 73-1259, Feb. 4, 1974 (unreported) 4

Rushing v. State (1948) 86 Okla.Cr. 241, 190 P.2d 828 9

Shamblin v. State (1949) 90 Okla.Cr. 33, 210 P.2d 197 9

Sibron v. New York (1968) 392 U.S. 40 8

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Smith v. United States (1876) 94 U.S. 97 7,8,10

White v. State (Alas., 1973) 514 P.2d 814 11

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MISCELLANEOUS

Supreme Court Rule 58 1,7

IN THE
SUPREME COURT OF THE UNITED STATES

No. A-186

MYER AARON RUHM,
Petitioner,

vs.

BOB TURNER, Sheriff,
Oklahoma County, Oklahoma,

and

Hon. HEZ J. BUSSEY, Judge,
Hon. TOM BRETT, Judge,

and

Hon. ROBERT D. SIMMS, formerly Judge,
Court of Criminal Appeals, State of Oklahoma,
Respondents.

PETITION FOR REHEARING

Comes now Petitioner, MYER AARON RUHM, and for his instant Petition for Rehearing would respectfully allege and state that since the date of the Court's unfavorable action herein of October 15, 1974, there has occurred, in the sense of Supreme Court Rule 58, a material factual as well as jurisdictional change in circumstances material to the Court's action, and

compelling of a reconsideration thereof, to wit: that on November 21, 1974, the Petitioner returned to custody, and thereby ceased to be a fugitive; and therefore, during time allowed to file this Petition for Rehearing, the procedural basis for the Court's prior declining to consider the merits herein has been resolved in favor of (re)consideration on the merits.

WHEREFORE, premises considered, Petitioner respectfully urges that the Court may and should consider his Petition for a Writ of Certiorari and his Motion to Vacate and Remand on their merits; and, in view thereof, respectfully prays the Court to grant a Writ of Certiorari to the Honorable Court of Appeals for the Tenth Circuit and/or to vacate the Order of the Court of Appeals herein and to remand the Cause to the said Court of Appeals for further consideration in the light of said Court's own intervening consolidated decision(s) of *Terry Lee Radcliff* v. *Anderson, Warden,* and *Grider, Warden* v. *William Lynn Stringfield,* 10th Cir., Nos. 73-1520 and 73-1550, June 14, 1974 ____F.2d ____, (petition for rehearing en banc pending).

Respectfully submitted,

FREDERICK P. GILBERT
1401 National Bank of Tulsa Building
Tulsa, Oklahoma 74103

Attorney for Petitioner

MEMORANDUM OF LAW

A. Substantive Summary

The Petitioner will but briefly refresh the Court's memory with the gravamen of his substantive plea: that Petitioner, a member of the statutorily unfavored male sex, was convicted in an Oklahoma court in 1970 at age 17 of the adult felony offense of "Possession of Marijuana," at a time when a like-aged similarly-offending member of the female sex, by virtue of 10 Okla.Stat, 1970 Supp., §1101(a), would only have been processed therefor as a mere juvenile and delinquent. In other words, since the said former 10 O.S. 1970 Supp., §1101(a) defined "juveniles" for delinquency (as opposed to criminal) purposes as males under 16 and females under 18, there existed at the time of Petitioner's alleged violation and prosecution therefor a statutory discrimination in Oklahoma's penal codes based solely upon the offender's biological sex, whereby the offender 16 or 17 years old of the male sex was prosecuted criminally for his misdeeds as an adult and a felon, whereas an offender 16 or 17 years old of the female sex committing identical (or even worse) offenses was only processed civilly therefore as a mere juvenile and delinquent.

Happily, this vicious penal discrimination based solely upon the youngster's anatomy was held unconstitutional in 1972 by the U.S. Court of Appeals for the Tenth Circuit,

Lamb v. *Brown*, 456 F.2d 18, which decision the Petitioner, whose instant conviction was then pending on direct appeal before the Oklahoma Court of Criminal Appeals, naturally cited in support and vindication of his own sex-equality arguments that he had already been urging prior to and independent of the *Lamb* v. *Brown* decision, supra. However, the State Court denied relief on the grounds of an asserted non-retroactivity of *Lamb* v. *Brown*. *Ruhm* v. *State* (Okla.Cr., No. A-16390, 1972) 496 P.2d 809, 815 (Brett, J., dissenting, at 816).

Federal relief was thereupon sought before the U.S. District Court for the Western District of Oklahoma. It should be noted that Petitioner's absence commenced during this period, no doubt in partial reliance upon the Federal Court's interim ruling that his absence would not be a bar to a consideration of the merits of his sex-equality claim for relief. See Appendix A hereto. However, the District Court also denied relief on the grounds of *Lamb* v. *Brown's* apparent non-retroactivity, *Rhum* v. *Turner, et al.* (W.D.Okla., No. CIV-72-420, 1973) 357 F.Supp. 324; and Petitioner's appeal to the Tenth Circuit was thereafter dismissed by said Court of Appeals by Order dated February 4, 1974, in *Ruhm* v. *Turner, et al.*, 10th Cir., No. 73-1259, unreported (which is the Order whose review is sought herein).

Subsequent to said dismissal, however, and indeed, while Petitioner's case was pending before the Supreme

Court, the Tenth Circuit either rethought or clarified its own position regarding the retroactivity of *Lamb* v. *Brown*, supra, quite probably in view of the subsequent Supreme Court retroactivity pronouncement of *Robinson* v. *Neil* (1973) 409 U.S. 505, and of the virtually identical *Woodall* v. *Pettibone* (4th Cir., 1972) 465 F.2d 49, cert. den. 413 U.S. 922 (1973) -- and ruled *Lamb* v. *Brown* to be fully retroactive! *Terry Lee Radcliff* v. *Anderson, Warden,* and *Grider, Warden,* v. *William Lynn Stringfield,* 10th Cir., Nos. 73-1520 and 73-1550 (consolidated), June 14, 1974, ____F.2d____ (hereinafter referred to as *Radcliff* and *Stringfield*).[1]

Since the Tenth Circuit itself has now held *Lamb* v. *Brown* to be fully retroactive, then *a fortiori* this Petitioner's teenaged conviction is also void, since it was still non-final as per pendency on direct State appeal at the time of *Lamb's* rendition. See *Linkletter* v. *Walker* (1965) 381 U.S. 618, at 625-627, and *Long* v. *Robinson* (D.Md., 1970) 316 F.Supp. 22, at 30-31[2] Under such clear-cut revelation of fundamental and substantive constitutional error and injustice, the Court should strive to insure that mere procedure shall not be allowed to operate so as

[1]Reproduced at Appendix A to the Petitioner's "Motion to Vacate and Remand" herein. (Petition for rehearing en banc pending.)

[2]Aff'd 436 F.2d 1116 (4th Cir., 1971), and held fully retroactive in *Woodall* v. *Pettibone* (4th Cir., 1972) 465 F.2d 49, cert. den. 413 U.S. 922 (1973).

possibly to deny this one Petitioner, alone of all similarly-situated teenaged appellants and petitioners, the benefit of the very argument he has been advancing now for upwards of four years.

B. Procedure

It is perfectly evident that the Supreme Court denied Petitioner a writ of certiorari herein not because of any lack of merit to his substantive, penal sex-equality claims, but essentially for the procedural reason that the Petitioner was not in custody -- as evidenced by the fact that the Court, in denying the writ on October 15, 1974, did not merely recite the usual "Denied," but instead stated, "The petition for a writ of certiorari is denied. See *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970)."

Thereafter, on November 21, 1974, the Petitioner returned to custody, and, pending further proceedings, has since been enlarged on $25,000 bond by the Municipal Court of the City of Los Angeles, State of California, Division No. 30, in Case No. A-313668, the Hon. Manuel Chavez, Municipal Judge, presiding. These events took place while the instant case was still "alive" before the Supreme Court during time within which to file an appropriate petition for rehearing; and the instant Petition for Rehearing is being filed within extension for the submission thereof, as per the Motions of the Petitioner's

father as well as counsel, outlining the need (based on counsel's temporary military absence) of an extension in order to properly present to the Court the change in material circumstances brought about by the Petitioner's return to custody.

* * *

A preliminary question, of whether the Petitioner's return to custody (and the resulting termination of his fugitive status) constitutes an "intervening circumstance of substantial or controlling effect" in the sense of Supreme Court Rule 58(b), can self-evidently be answered in the affirmative, for when an appellate-type action is not entertained by an appellate court for the stated reason of the appellant's absence, the appellant's return in obviously not only *an* "intervening circumstance of substantial or controlling effect," it is *the* (i.e., *only*) such intervening circumstance -- if indeed, anything is!

The other question relevant to this rehearing is simply whether the Petitioner's return was timely. The decisional authority on this point discloses an affirmative answer thereto.

At the outset, it should perhaps be recognized that the juridical basis for striking an appellate-type action of a fugitive is not, in the absence of statute, entirely clear. In *Smith* v. *United States* (1876) 94 U.S. 97, the Supreme

Court cited "mootness" as the basis for dismissing fugitives' appeals and/or petitions:

> "If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not as he may consider most for his interest. Under such *circumstances, we are not inclined to hear and* decide what may prove to be only a moot case."

Id., 94 U.S. at 97, 24 L.Ed. at 32. But *quaere*, can "mootness" withstand rigid analysis as the basis for dismissing fugitives' appeals? If "mootness" be the grounds therefor, that would be tantamount to saying that a criminal appeal loses its character as a "case or controversy" in the sense of Article III of the Constitution whenever the appellant flees; and if that be true, then, under Article III, there would clearly be no *jurisdiction* to entertain such an appeal. But in *Smith* v. *United States*, supra, the Supreme Court expressly held its discretionary, not jurisdictional, for the Court to decline to adjudicate the appeal's merits:

> "It is clearly within our discretion to refuse to hear a criminal case in error unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render."

Id., 94 U.S. at 97. A "discretionary" as opposed to a "jurisdictional" approach to the disposition of fugitives' appeals would also appear compelled by the modern reconsideration of the "mootness" concept. see. e.g., *Sibron* v. *New York* (1968) 392 U.S. 40, Part I, at 50-58, and *Carafas*

v. *LaValle* (1968) 391 U.S. 234. Indeed, the modern fugitive cases themselves have indicated that "mootness" -- in the sense of a jurisdictional lapse for lack of a judiciable "case or controversy" -- is not the reason for the dismissal of fugitives' appeals. *Eisler* v. *United States* (1949) 338 *U.S. 189; Molinaro* v. *New Jersey (1970) 396 U.S. 365.* Moreover, if we were to view Federal appellate jurisdiction as entirely the creation of statute (see Const., Art. III, Sec. 2, Cl. 2), and if no statute actually divests Federal appellate tribunals of jurisdiction over fugitives' appeals (or authorizes their dismissal), then clearly, the judicial disposition of such appeals must depend not upon a lapse of jurisdiction, but upon some other source, such as the Judiciary's inherent power to control its own dockets.

State decisions also support the theory that, at least in the absence of statute, the disposition of fugitives' appeals is more a matter of discretion than of strict jurisdiction by the appellate tribunal; and indeed, in Oklahoma itself the rule appears to be that if the appeal of even a fugitive discloses *fundamental* error, the discretion of the appellate court is better exercised in going ahead and reversing the obvious injustice on its merits, regardless of how 'deserving' thereof the fugitive might be deemed to be because of his flight. *Brigman* v. *State* (Okla.Cr., 1960) 350 P.2d 321; *Shamblin* v. *State* (1949) 90 Okla.Cr. 33, 210 P.2d 197; *Rushing* v. *State* (1948) 86 Okla.Cr. 241, 190 P.2d 828, 831.

Deducing, then, that the disposition of a fugitive's appeal is a matter vested almost entirely within the Court's sound discretion, to be exercised on whatever grounds the Court deems to be just and proper, what, then, is the just and proper course when, as here, the fugitive reappears only 37 days after the Court's initial denial or dismissal, still during Term time, and even within time to petition for rehearing based on the one change in material circumstances really relevant to dismissal *vel non*?

Curiously, there appears to be little decisional authority on this precise point. In the Supreme Court case previously quoted from, of *Smith* v. *United States*, supra, 94 U.S. 97, the Court had patiently kept the plaintiff-in-error's appeal on the docket for *six years* in the hopes he would turn himself in--and then ordered the appeal dismissed unless he should surrender himself before the first day of the *next* October Term. And in *Bohanan* v. *Nebraska* (1887) 125 U.S. 692, the plaintiff-in-error was given until the last day of that Term. In the more modern case of *Eisler* v. *United States* (1949) 338 U.S. 189, the fugitive petitioner's case was "left off the docket" (338 U.S. at 190) by the majority opinion on June 27, 1949 -- yet it was not until well into the next October Term, on November 21, 1949, that the Court formally dismissed his petition for certiorari. 338 U.S. 883. A somewhat more stringent posture was taken in *Molinaro* v. *New Jersey* (1970) 396 U.S. 365, yet the Court there did not lay down

any *per se* rule for immediate dismissal therein, but rather, merely stated that the dismissal of a fugitive's appeal "*need* not" be given any specific "period of grace." 396 U.S. at 366. Moreover, the record is silent in *Molinaro* as to what would have happened had the appellant promptly, and in time for rehearing, returned to custody.

The few State cases on the subject also indicate that the judicial discretion involved in the disposition of fugitives' appeal is best exercised, at least in the absence of statute to the contrary, in favor of adjudicating the merits thereof so long as the appellant surfaces in term time, or otherwise while the appeal is in any sense "alive". *Knight* v. *State* (1950) 190 Tenn. 326, 229 S.W.2d 501; *Crawford* v. *State* (1953) 8 Terry (47 Del.) 552, 94 A.2d 603; *Harrelson* v. *State* (1954) 222 Miss. 514, 76 So.2d 516.[3] See also *White* v. *State* (Alas., 1973) 514 P.2d 814. This rule is no doubt akin to that fundamental principle of jurisprudence that adjudications of serious controversies on their substantive merits are favored in the law, and that courts will normally strive to set aside what amount to default judgments -- particularly in cases of some

[3]Modified somewhat in *Jones* v. *State* (Miss., 1969) 218 So.2d 705 to allow a flat 90-day period of grace from the announcement of the tentative dismissal.

cognizable degree of dispatch after the default is entered. see, e.g., *Singleton* v. *LePak* (Okla., 1967) 425 P.2d 974.[4]

Determining, then, that there is clearly no jurisdictional obstacle to the Court's present (re)consideration of the Petitioner's action-in-chief herein on its merits, but rather, that the Court may take whichever course it desires in its own discretion, and remembering further that this discretion to consider on the merits is normally exercised affirmatively whenever the appellant returns to custody, as this Petitioner has, while his case is still "alive" before the appellate tribunal, and/or whenever the appellate petition discloses plain or fundamental error (recall the *Brigman* line of cases, cited at page 9, supra), the Petitioner would then conclude this Petition for Rehearing with the following points directed to the Court's discretion:

First, the fundamental correctness of the Petitioner's retroactive - invalidity - of - substantive - sexual - criminal - discriminations arguments are incontrovertly established by compounding *Frontiero* v. *Richardson* (1973) 411 U.S. 677, with *Robinson* v. *Neil* (1973) 409 U.S. 505.

[4]In the interests of completeness, Petitioner would mention the ancient case of *Allen* v. *Georgia* (1897) 166 U.S. 138, wherein the Supreme Court affirmed the Supreme Court of Georgia's dismissal of a fugitive's appeal even after his reappearance - but even in that case, the State court did in fact grant the fugitive a 60-day period of grace to return to custody -- which the appellant exceeded by some eleven months.

And second, the "plain error" of Petitioner's action is readily evident from the fact that the Tenth Circuit itself has now held *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, fully retroactive, and has thereby necessarily included Petitioner's own conviction within those now constitutionally voided! *Terry Lee Radcliff* v. *Anderson, Warden,* and *Grider, Warden* v. *William Lynn Stringfield,* 10th Cir., Nos. 73-1520 and 73-1550 (consolidated), ____F.2d____,[5] citing *Woodall* v. *Pettibone* (4th Cir., 1972) 465 F.2d 49, cert. den. 413 U.S. 922 (1973).

Finally, counsel would respectfully invite the Court's attention to the Petitioner's youthful age; his "adult" prosectuion for the "felony" (since reduced to a misdemeanor) of having the misfortune to have been driving someone's car into which someone had thrown the butt of a burned marijuana cigarette and some suspicious-looking seeds[6] -- which were discovered under the seat by police making a "routine" search incidental to a traffic offense (which was later dismissed) -- and for which the Petitioner was sentenced to the maximum seven years[7] in the infamous Oklahoma State Penitentiary.[8] And to these

[5]Petition for rehearing en banc pending.

[6]See dissenting opinion to Petitioner's State affirmance, *Ruhm* v. *State,* supra, 496 P.2d at 816.

[7]Reduced on appeal to a "mere" four years and a fine. *Ruhm* v. *State* (Okla.Cr., 1972) 496 P.2d at 815.

[8]So condemned in *Battle and The United States* v. *Anderson, Warden, et al.* (E.D. Okla., 1974) 376 F.Supp. 402.

purely legal miscarriages of justice must be added the staggering expense in legal and related fees which have crushed the youth's family over the years this litigation has dragged on, not to mention the mental anguish and psychic trauma by which the intervening years of agonizing anxiety have driven the Petitioner (at least in the opinion of counsel) to the bounds of mental disturbance and even disorder.

Indeed, this is not a case of the State of Oklahoma "merely" seeking its legal "pound of flesh" -- the State apparently craves the Petitioner's blood and soul as well in what could well constitute a paradigm microcosm of everything that is wrong with contemporary State and local "prosecutionism." It is difficult, of course, not to feel some sense of reproval for the Petitioner's apparent weakness for "taking the law into his own hands" for a while, though certainly his youth and the oppressive circumstances of this case cry out at least in mitigation thereof. Yet *quaere*, has the State been truly prejudiced thereby? Obviously not, for all the State has "lost" was its "right" to incarcerate the Petitioner pursuant to a conviction which even the local Circuit itself would now void and vacate. Petitioner's true offense (other than to himself) sounds perhaps more in an affront to the judicial process than to the State, which, counsel would again suggest, was to some degree "allowed" by the Federal Court itself (Appendix A) after possibly being provoked by the State Court (see Appendix B).

But that is past, and the Petitioner is back -- in time. He therefore submits that an abundance of legal and discretionary bases exist for the Court to sustain his Petition for Rehearing, and to consider on the merits and to grant his Petition for a Writ of Certiorari, whether for plenary consideration by the Supreme Court, or as per the Motion to Vacate and Remand, for reconsideration by the Court of Appeals in the light of the Circuit's own recent *Radcliff* and *Stringfield*, supra.

Respectfully submitted,

FREDERICK P. GILBERT
1401 National Bank of Tulsa Building
Tulsa, Oklahoma 74103

Attorney for Petitioner

CERTIFICATE OF COUNSEL

I, Frederick P. Gilbert, counsel for the Petitioner herein and a member of the Bar of this Honorable Court, do hereby certify, pursuant to Supreme Court Rule No. 58(b), that this Petition for Rehearing is presented in good faith and not for delay; and I certify further that the instant Petition for Rehearing is limited to one intervening circumstance of substantial and controlling effect, to wit: the termination of the Petitioner's status as a fugitive, effected by his return to custody (and present enlargement on bond) on or about November 21, 1974.

FREDERICK P. GILBERT
1401 National Bank of Tulsa Building
Tulsa, Oklahoma 74103

Attorney for Petitioner

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MYER AARON RUHM,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Case No. 72-420 Civil
	)	
BOB TURNER, Sheriff, Oklahoma County, Oklahoma,	)	
	)	
	)	
Defendant.	)	

ORDER

The Defendant's Motion To Dismiss based on his assertion that the Plaintiff is not "in custody" is overruled.

The Complaint appears to contain a civil rights action. Custody is not an essential to this type of action. Defendant will answer the Complaint within ten (10) days from the date hereof.

It is so ordered this 21 day of August, 1972.

/s/ Fred Daugherty
Fred Daugherty
United States District Judge

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

No. A-16,390

MYER AARON RUHM,
Plaintiff in Error,

vs.

THE STATE OF OKLAHOMA,
Defendant in Error.

ORDER DENYING BOND

WHEREAS, it is anticipated that an appeal to Federal District Court or the United States Supreme Court may be forthcoming in the above-styled and numbered cause on a jurisdictional question;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that bond, pending any further proceedings in any Court, be, and the same is, hereby DENIED.

WITNESS MY HAND AND SEAL OF THIS COURT this 1st day of May, 1972.

/s/ Hez J. Bussey
Presiding Judge

/s/ Robert D. Simms
Judge